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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~617~~ 38

AXEL LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," HER ENGINES, ETC., PETITIONER,

vs.

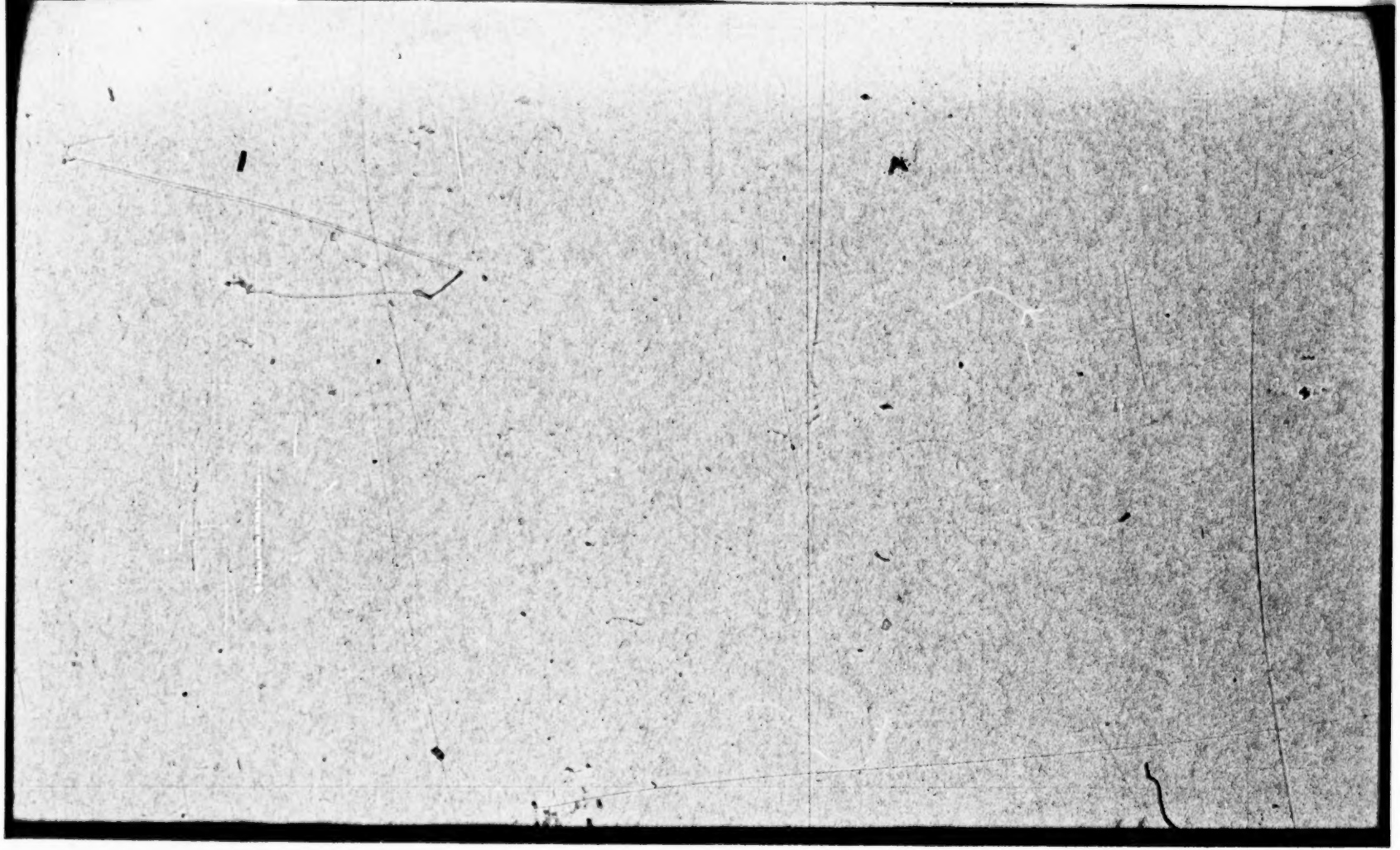
WINFIELD A. GREEN, CLAIMANT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1930

CERTIORARI GRANTED MARCH 12, 1930

(34,748)



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NAMES AND ADDRESSES OF PROCTORS.

WINTER S. MARTIN, Esq., Proctor for Appellant,

2013 Smith Tower Bldg., Seattle, Washington.

SAMUEL B. BASSETT, Esq., Proctor for Appellant,

1421 Northern Life Tower, Seattle, Washington.

Messrs. BRONSON, JONES & BRONSON, Proctors for Appellee,

614 Colman Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 12,189.

In the Matter of the Petition of AXEL LANGNES, Sole Owner of the Diesel Halibut Vessel "ALOHA," Her Engines, etc., for Exemption from or Limitation of Liability.

PETITION FOR EXEMPTION FROM OR LIMITATION OF LIABILITY.

To the Honorable the Judges of the Above-entitled Court:

The libel and petition of Axel Langnes, a citizen

*Page-number appearing at the foot of page of original certified Apostles on Appeal.

and resident of Seattle, King County, State of Washington, and sole owner of the Diesel halibut vessel "Aloha," her engines, boats, apparel, furniture and appurtenances in a cause of exemption from or limitation of liability, respectfully shows to the court:

First. That your petitioner, Axel Langnes, now is, and at all times hereinafter mentioned has been, a citizen and resident of the city of Seattle, King County, State of Washington, his address being 4234 Eighth Avenue, N. E.

Second. That your petitioner now is, and at all times hereinafter mentioned was, the sole owner of the Diesel halibut vessel "Aloha," being a vessel of the United States of America, registered in the coasting and fishing trade, said vessel at present lying and being afloat in the navigable waters of the United States at the port of Seattle, King County, State and Western District of Washington and within the admiralty and maritime jurisdiction of this Honorable Court. [2]

Third. That said M. S. "Aloha" at all times hereinafter mentioned was used and employed by your petitioner as a halibut fishing vessel engaged in the catching and transportation of fish in the waters of Puget Sound, British Columbia, and the Gulf of Alaska; that at the time of the occurrence hereinafter mentioned said vessel was afloat upon the high seas in waters adjacent to Queen Charlotte Sound, British Columbia, and that said voyage terminated at the port of Seattle, King County,

State and Western District of Washington, on the 27th day of May, 1927.

Fourth. That the said vessel was at all times hereinafter mentioned in all respects seaworthy and properly and efficiently officered, manned, equipped and furnished and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the business in which said vessel was engaged upon said voyage; that your petitioner, the owner of said vessel at the time of and at all times prior to the occurrence herein mentioned, exercised and had exercised due care and diligence to make said vessel in all respects seaworthy, properly and efficiently officered, manned, equipped, supplied and furnished and well and sufficiently fitted and supplied with suitable engines, machinery, tackle, apparel, appliances and furniture as aforesaid.

Fifth. That prior to said 13th day of May, 1927, before embarking upon said voyage, your petitioner, the owner of the whole of said M. S. "Aloha," entered into an oral agreement with certain other fishermen by the terms of which said petitioner and said other fishermen agreed to embark upon a joint and common fishing venture, your petitioner, Axel Langnes, to act as master and [3] fisherman and one Winfield A. Green to act as engineer and fisherman, and the proceeds and profits of said voyage to be divided among said persons and fisherman on the basis of shares pursuant to the usual and customary practice among halibut fishermen sailing

from the port of Seattle; that thereafter, pursuant to the terms of said agreement, your petitioner and said other fishermen, including said Winfield A. Green, said petitioner and said Winfield A. Green on board in said respective capacities and said other fishermen, as a joint and common fishing venture, embarked upon said voyage, all of the members of the crew of said vessel being common principals and partners in said joint undertaking, except that your petitioner was the sole owner of said vessel, no one of said persons being an employer and no one of said persons being an employee on and during said voyage.

Sixth. That at the time of entering into said agreement, the said Winfield A. Green herein represented himself to be, and on information and belief petitioner alleges that he was an experienced engineer and halibut fisherman, and as such knew or should have known all of the ordinary and usual and customary dangers and hazards to be encountered upon said joint fishing venture.

Seventh. That on the 13th day of May, 1927, subsequent to the sailing of said vessel, properly officered, manned and equipped and seaworthy in all respects, as aforesaid, the said Winfield A. Green, hereinbefore mentioned, in performing his joint and common services on board said vessel, said vessel then being upon the high seas engaged in fishing, was stationed in the waist of said vessel adjacent to a long and heavy halibut ground-line which was then being hove aboard said vessel by means of a power propelled windlass, said Winfield A. Green's

duties being to tend said ground-line [4] and the leaders and halibut hooks attached thereto and remove the fish therefrom, if any, as said ground-line and gear was hove aboard said vessel, the said windlass being controlled by a lever affixed to the inboard side of the vessel's rail at said place.

Eighth. That all of the dangers, hazards and risks encountered by said Winfield A. Green at said time and place were the usual ordinary and customary dangers and hazards and risks customarily and necessarily encountered by fisherman acting in said Winfield A. Green's capacity, and that all of said dangers, hazards and risks were open, obvious and apparent, were, at and from the inception of said voyage, fully known, understood and appreciated by said Winfield A. Green at all of said times and that all of said risks, hazards and dangers were by him voluntarily assumed.

Ninth. That custom and usage and the care which should have been exercised by an ordinarily careful and prudent man of said Winfield A. Green's experience and ability under similar circumstances required that, to properly and safely tend said ground-line, plaintiff should have used both hands to keep slack in the leaders by which said halibut hooks were attached to said ground-line in order to keep said hooks free, disentangled and to prevent the same from becoming fouled or catching upon each other, the ground-line or the hull, fittings and appurtenances of said vessel; that said vessel was equipped with a hand lever placed immediately adjacent to said roller and within easy reach and

for the use of the fisherman properly tending said ground-line at said roller, the purpose and use of said lever being to stop said winch in the event, as frequently happened in the customary, normal and ordinary use of such fishing gear, a hook or hooks might become caught, snagged or entangled while said ground-line was being taken aboard over said [5] roller, that then, and in that event, said winch could be instantly stopped by the use of such lever, and custom and usage and the care which should have been exercised by an ordinarily careful and prudent man of Winfield A. Green's experience and ability, under similar circumstances, required that said winch and said ground-line should have been stopped by said Winfield A. Green by using said lever until said hook or hooks were freed or disentangled, but that notwithstanding all of the foregoing, on said 13th day of May, 1927, said Winfield A. Green negligently and carelessly, and with willful disregard for his own safety, failed, refused and neglected to tend said line, said leaders and said hooks with both hands, and to so use said winch lever to stop said winch and ground-line, but, on the contrary, said Winfield A. Green negligently and carelessly attempted to tend said line and gear by using only one hand, and negligently and carelessly failed, refused and neglected to stop said winch and said ground-line by means of said lever, and allowed said hooks to be broken or torn loose and disentangled by means of the power and strain applied thereto from said winch; that if, in fact, said Winfield A. Green suffered or sustained any of the in-

juries alleged in the action hereinafter mentioned, said injuries, and all of the consequences thereof, were the natural and proximate result of said negligence and carelessness on the part of said Winfield A. Green herein in the foregoing respects, and any and all damage and/or injury, if any, sustained by said Winfield A. Green, as alleged in said complaint, or otherwise, was due solely and proximately to the negligence and carelessness and want of due regard of said Winfield A. Green for his own safety.

Tenth. That the said Winfield A. Green heretofore, to wit: on or about the 11th day of October, 1927, commenced an action [6] in the Superior Court of the State of Washington for King County against your petitioner, being Cause No. 205,037, wherein said Green seeks to recover damages from your petitioner in the sum of twenty-five thousand ($25,000.00) dollars, together with costs and disbursements in said action expended, said damage being alleged to have been incurred by reason of the matters and things aforesaid; that said cause is now pending and undetermined in said court Geo. F. Vanderveer, Esquire, with officers at 1011 Alaska Building, Seattle, King County, Washington, being attorney for plaintiff in said cause.

Eleventh. That in addition to the above, your petitioner is in fear that other suits or actions may and will be brought against him, or the said M. S. "Aloha," by other persons or parties who may have sustained loss, damage or injury by reason of the matters aforesaid or other casualties occurring upon said voyage.

Twelfth. That your petitioner avers that he is the owner of the whole of said Diesel halibut vessel "Aloha" and that the value of said vessel and the value of the interest of your petitioner therein at the close of said voyage did not exceed the sum or value of four thousand five hundred ($4,500.00) dollars; that at the time of said occurrence and at the close of said voyage there was no freight earned or pending from the use and operation of said vessel, but that at the close of said voyage the share of earnings or proceeds of said voyage, being the *pro rata* share of the sale value of the fish then on board, was earned and owing to the vessel in the amount of one hundred eighty-nine and 88/199 dollars ($189.88), and the share thereof earned by and owing to your petitioner was the sum of eighty-seven and 60/100 dollars. [7] Petitioner further avers that the amount of the claim and suit already begun against petitioner and the said M. S. "Aloha" far exceeds the value of his interest in said vessel and her said accrued earnings.

Thirteenth. That petitioner desires to claim the benefits of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto, and in this proceeding by reason of the facts and circumstances hereinbefore set forth, petitioner further desires to test its liability and the liability of said M. S. "Aloha" to any extent whatever for any and all loss, destruction, damage and injury caused by and resulting from the occurrence aforesaid or other casualties of said voyage.

Fourteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, petitioner prays that this Court will cause due appraisement to be had of the amount of the value of his interest in the said M. S. "Aloha" at the close of said voyage, together with the amount of the vessel's and petitioner's share of the earnings of said voyage, and will make an order for the payment of the same into court, or for the giving of a stipulation with sureties providing for the payment thereof as ordered by the Court; that the Court will issue a monition to all persons claiming, or to claim, damages for any and all loss, destruction, damage or injury caused by or resulting from the occurrence aforesaid, or other casualties of said voyage, citing them to appear before a Commissioner to be named by the Court and make due proof of their [8] respective claims at or before a time certain to be fixed in said writ; and also to appear and answer on oath the allegations of this petition according to law and the practice of this court, and that the Court will issue its injunction restraining the prosecution of the aforesaid action of Winfield A. Green and the commencement and prosecution hereafter of all or any suit or suits, actions or actions, or legal proceedings of any nature or description whatsoever, except in the present proceeding against petitioner, or the M. S. "Aloha" in respect of any claim or claims arising out of said occurrence, and that the Court in this proceeding will adjudge that petitioner and the said M. S.

"Aloha" are not, and neither of them is, liable to any extent for said loss, damage and injury; or if it shall adjudge that they, or either of them, are liable then that the liability of petitioner be limited to the amount of the value of his interest in said vessel and the accrued share of the proceeds belonging to the said vessel and said petitioner at the close of said voyage, and that the moneys paid or secured to be paid, as aforesaid, be divided *pro rata* among such claims as may duly prove and have allowed their claims before the Commissioner heretofore referred to, saving to all parties any priority to which they may be legally entitled, and that petitioner may have such other and further relief in the premises as may be just.

G. E. STEINER,
BRONSON, JONES & BRONSON,
Proctors for Petitioner. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

Axel Langnes, being first duly sworn, on oath deposes and says:

That he is the petitioner herein; that he has read the above and foregoing petition, knows the contents thereof and that the same are true except as to matters therein alleged on information and belief and as to such matters that he believes them to be true.

AXEL LANGNES.

Subscribed and sworn to before me this 4th day of February, 1928.

[Seal] R. E. BRONSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 4, 1928. [10]

[Title of Court and Cause.]

STIPULATION RE VALUATION OF M. S. "ALOHA," ETC.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective proctors undersigned, that the value of the interest of petitioner, Axel Langnes, and/or Ragna Langnes, his wife, in the Diesel halibut vessel "Aloha," her engines, etc., and pending freight, if any, on the 27th day of May, 1927, or at any time during and up to the end of the voyage mentioned in the petition herein from the 13th day of May, 1927, was of no greater value or amount than the sum of five thousand dollars ($5,000.00).

IT IS FURTHER STIPULATED AND AGREED that petitioner herein may file a good and sufficient stipulation for value herein in the amount of five thousand dollars ($5,000.00) in due form except for an actual appraisement of said values, which are hereby expressly waived, pursuant to rules of court and the statutes in such cases made and provided.

IT IS FURTHER STIPULATED AND AGREED that, on the filing of such good and sufficient stipulation, so far as claimant, Winfield A. Green, may or shall be concerned in said proceedings, said Langnes and wife shall be deemed to have had due and regular appraisement made of their interest in and to said vessel and pending freight as of the end of the voyage mentioned in the petition herein, viz.: the 27th day of May, 1927, to the full extent [11] of the rules of court in such cases and Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto.

IT IS FURTHER STIPULATED AND AGREED that, in the event of the appearance of other claimants in this proceeding other than the said Winfield A. Green, then and in that event said stipulation for value shall be subject to surrender by petitioner of said vessel in these proceedings, or this stipulation shall be subject to modification as a result of any application by any other claimant or claimants to have the amount of the said stipulation for value increased or diminished as the case may be on the filing of the report of appraisers thereupon to be appointed to appraise the amount or value of petitioner's interest in said vessel or pending freight, if any, or upon the ultimate determination of the Court on exceptions to the appraisers' report.

IT IS FURTHER UNDERSTOOD that this stipulation is subject to approval by the Court, and

is without prejudice to any of the claimant's rights to contest the petition or restraining order herein except as to appraisal.

Dated at Seattle, Washington, this 11th day of February, 1928.

G. F. VANDERVEER,
Proctor for Claimants Green.
BRONSON, JONES & BRONSON,
Proctors for Petitioner.

[Endorsed]: Filed Mar. 30, 1928. [12]

[Title of Court and Cause.]

STIPULATION FOR APPRAISED VALUE OF M. S. "ALOHA."

WHEREAS, a libel and petition was filed herein on the 4th day of February, 1928, by Axel Langnes, owner of the Diesel halibut vessel "Aloha," her engines, etc., praying for exemption from or limitation of his liability on account of any loss, damage or injury arising out of a certain occurrence, happening on board said vessel, and the amount or value of the interest of petitioner in said vessel and her pending freight has been duly fixed at the sum of four thousand seven hundred twenty-two and 52/100 dollars ($4,722.52) for said vessel and the sum of two hundred seventy-seven and 48/100 dollars ($277.48) for said freight — in all five thousand ($5,000.00) dollars, as appears from stipulation fixing value in lieu of appraisal now on file in this

court, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the petitioner, or his sureties, execution for the above stipulated amount of five thousand ($5,000.00) dollars with, interest thereon from this date, may issue against their goods, chattels and lands,—

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and C. F. Nordby, residing at 2311–15th Avenue, South, in the city of Seattle, and by occupation [13] a merchant, and Robert J. W. Miller, residing at 2336–33d Avenue, South, and by occupation a merchant, the stipulators undersigned shall abide by all orders of the Court, interlocutory or final, and pay into court the above sum of five thousand ($5,000.00) dollars, with interest, whenever ordered by this Court, or by an Appellate Court if an appeal intervene, then this stipulation to be void; otherwise, to remain in full force and virtue.

AXEL LANGNES,
Petitioner.

C. F. NORDBY,
ROBT. J. W. MILLER,
Sureties.

Approved:

NETERER,
Judge.

United States of America,
Western District of Washington,
Northern Division,—ss.

The above sureties and stipulators, being first

duly sworn, each for himself, and not one for the other, deposes and says:

That he resides as above set forth and that he is worth the sum of ten thousand ($10,000.00) dollars over and above all his debts, liabilities, exemptions and community estate.

C. F. NORDBY.
ROBT. J. W. MILLER.

Subscribed and sworn to before me this 24th day of March, 1928.

[Seal] J. LYNN MILLER,
Notary Public in and for the State of Washington,
Residing at Seattle.

OK.—G. F. VANDERVEER and
S. B. BASSETT.

[Endorsed]: Filed Apr. 17, 1928. [14]

[Title of Court and Cause.]

CLAIM OF WINFIELD A. GREEN.

To the Honorable Judges of the Above-entitled Court:

The claim and complaint of Winfield A. Green against the schooner "Aloha," her tackle, apparel, machinery, furnishings, equipment, etc., and against all persons claiming or intervening for their interests in a cause for damages resulting from personal injuries sustained by a seaman and fisherman, civil and maritime, alleges and claims as follows:

I.

That at all the times hereinafter mentioned the petitioner, above named, and Ragna Langnes were, and still are, husband and wife: were the owners of the gas fishing schooner "Aloha," and employed the claimant as an engineer and fisherman for a fishing voyage of said vessel to the halibut banks at Cape St. James, Queen Charlotte Island, British Columbia.

II.

That in fishing for halibut in said banks the [15] petitioner employed a long, heavy ground-line, to which, at intervals of thirteen feet, heavy halibut fish-hooks were attached by five-foot fishing lines and whenever it was desired to raise the ground-line for the purpose of removing fish, one end was passed around a power-driven capstan located amidships by means of which the line was then hauled aboard the vessel over a large fourteen-inch roller located on the starboard rail. That the starboard backstay was secured to a *havey* metal strap bolted in a vertical position to the side of the vessel in such a manner that it was raised about half an inch above the planking, and the petitioner negligently placed the roller over which the ground-line was hauled aboard said vessel, within three or four inches of said strap, and negligently failed to cover said strap or take any other precaution to keep the fish-hooks from catching on the same, as a natural and proximate result whereof, as the petitioner well knew, or in the exercise of reasonable care should have known, there was danger that, as the ground-line was hauled inboard across said roller, the halibut

hooks would catch on said backstay strap and, when torn loose by the winch, would fly back into the faces of the fishermen who were raising and stowing the line.

III.

That on the 13th day of May, 1927, as a natural and proximate result of the petitioner's aforesaid negligence, while the claimant and other fishermen were engaged in hauling the ground-line aboard said vessel in the manner hereinabove described, one of the fish-hooks caught on said backstay strap, and, when torn loose therefrom by the capstan, it flew back into the claimant's face, striking him in the left eye and destroying the sight thereof. [16]

IV.

That at the time of receiving said injuries the claimant was an able-bodied man of the age of forty-nine years, capable of earning $200.00 per month as a marine engineer and fisherman. That as result of said injuries he was totally incapacitated from performing any gainful labor for a period of three months to his damage in the sum of $720.00; that the sight of his left eye has been permanently destroyed; that the claimant is informed and believes, and therefore alleges, that his right eye will be permanently impaired; he has suffered intense pain from said injury and that his left eye has become shrunken and unsightly, causing him to suffer intense shame and humiliation, to his damage in the total sum of $25,000.00.

WHEREFORE, the claimant prays that upon making due proof of his claim, according to the course of this Honorable Court, in such cases, that said claim for damages be allowed and that said schooner "Aloha" may be condemned and sold to pay the same, and that the Court will grant the claimant herein such other and further relief as in law and justice he may be entitled to receive.

G. F. VANDERVEER and
S. B. BASSETT,
Proctors for Claimant.

State of Washington,
County of King,—ss.

S. B. Bassett, being first duly sworn on oath, deposes and says: That he is one of the proctors for the above-named claimant; that he has read the foregoing claim, knows the contents thereof and believes the same to be true.

[Seal] S. B. BASSETT.

Subscribed and sworn to before me this 20th day of March, 1928.

ALBERT D. MARTIN,
Notary Public in and for the State of Washington,
Residing at Seattle. [17]

[Endorsed]: Copy received 3/20/28. Delay in filing claim waived.

BRONSON, JONES & BRONSON.

[Endorsed]: Filed Mar. 20, 1928. A. C. Bowman, U. S. Commissioner.

[Endorsed]: Filed Apr. 2, 1928. [18]

[Title of Court and Cause.]

FINDING AND ORDER OF U. S. COMMISSIONER ALLOWING CLAIM OF WINFIELD A. GREEN.

To the Honorable Judges of the Above-entitled Court:

The claim of Winfield A. Green was presented and filed March 20, 1928, pursuant to the order limiting time of filing claims in said matter, and is returned herewith.

A. C. BOWMAN,
U. S. Commissioner.

[Endorsed]: Filed Apr. 2, 1928. [19]

[Title of Court and Cause.]

MOTION TO DISSOLVE RESTRAINING ORDER AND DISMISS PETITION.

Comes now the claimant and appearing specially for the purpose of this motion, and not otherwise, and moves that the restraining order heretofore issued herein, be dissolved and set aside on the following grounds:

(1) That the Superior Court of the State of Washington for King County has jurisdiction of said cause.

(2) That there is only one possible claimant and one owner, and therefore, no occasion for the institution of this proceeding.

(3) That the petitioner may claim and obtain the advantage and benefit of Section 4283 of the Revised Statutes of the United States by proper pleading in the action instituted by claimant in the Superior Court of the State of Washington for King County.

(4) That the petitioner's only object and purpose in this proceeding is to oust said state court of its jurisdiction, and thereby deprive claimant of the right to maintain his action at law with trial by jury, pursuant to Sec. 9 of the Judiciary Act of 1789 and the Merchant Marine Act of 1920, Section 33.

This motion is based upon the files and records herein.

G. F. VANDERVEER and
S. B. BASSETT,
Proctors for Claimant. [20]

POINTS AND AUTHORITIES SUBMITTED IN SUPPORT OF THE FOREGOING MOTION.

The petitioner recites in his petition that he is the sole owner of the Diesel halibut vessel "Aloha," and it is inconceivable that any other claim or claims than that of the claimant, Winfield A. Green, can possibly arise out of the disaster in question. The monition issued out of this court directed that

> "All persons claiming damages for any loss, damage, injury or destruction occasioned by said disaster, to appear before said court and make due proof of their respective claims

* * * on or before the 20th day of March, 1928, at ten o'clock in the forenoon."

The time for filing such claims has now expired and the Commissioner has reported that the claim of Winfield A. Green is the only claim on file.

It is well settled that a defendant ship owner may set up the statutory limitation of liability as a defense or a partial defense in the state court; and when a suitor sommences his action in the state court, and there is only one possible claimant and one owner, the ship owner, if he desires to take advantage of the Limited Liability Act, must do so by pleading the same in his answer and not by instituting an independent proceeding in a Court of Admiralty.

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 Law Ed. 927;
The Lotta, 150 Fed. 219;
Delaware River Ferry Co. vs. Amos, 179 Fed. 756;
Loughlin vs. McCaulley, 40 Atlantic, 1020;
The Eureka, 108 Fed. 672;
The Rosa, 53 Fed. 132. [21]

In Carlisle Packing Co. vs. Sandanger, *supra,* the Supreme Court of the United States held:

> "In a State Court, when there is only one possible Claimant and one owner, the advantage of this Section (Section 4283 of the Revised Statutes) may be obtained by proper pleading. The Lotta, 150 Fed. 219–222; Delaware River Ferry Co. vs. Amos, 179 Fed. 756."

In Lotta, 150 Fed. 219, 221, 223, which was ap-

proved by the Supreme Court in the Sandanger case, the court said:

> "Obviously, when there are several claimants who may proceed *in rem* against a vessel, and the aggregate of their claims may be greater than its value, and there is need of an apportionment among them, this court alone has the requisite jurisdiction; and the statute and rule of the Supreme Court provides the method and machinery to effectuate the object desired.
>
> Courts of common-law jurisdiction are inadequate for that purpose; but where there is only a single claim, and there is no need of an apportionment of the proceeds of the vessel among several claimants, there does not appear to be any need to adopt the methods provided in such cases as demand the peculiar and exclusive jurisdiction of the court of admiralty. An answer setting up the limitation of liability under Section 4283 is all that is necessary to give to the owner of the vessel the relief to which he is entitled. It appears in this case that, proceeding in accordance with Rule 54, a motion has issued, and all persons having claims against the Lotta have been required to present them to the Clerk of this Court on or before January 28, 1907.
>
> That time has expired, and no claims have been presented. The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel, and that value may be determined

as appropriately and as easily in that court as in this. In the *ex parte* proceedings here the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, the plaintiff is entitled to be heard on that question, and in the usual course of the common-law proceeding that issue can be fairly tried.

In the Great Western, 118 U. S. 521, 6 Sup. Ct. 1172, 30 L. Ed. 156, the syllabus is as follows:

'Limited liability may be claimed, first, merely by way of defense to an action; or, second, by surrendering the ship or paying her value into court. The latter method is only necessary when the ship owner desires to [22] bring all the creditors claiming damages into concourse for distribution.'

That was a case in admiralty, where the answer set up the defense that the liability of the respondent was limited to the amount or value of his interest in the ship and her freight; and Justice Bradley says:

'The issue being thus raised, the respondent was entitled to have the decree against him in that cause limited to the amount which should be shown by the proofs on the trial to be the value of said steamer and freight at the termination of the voyage. He did not need to make any surrender or attempt a surrender. A surrender of the vessel, or payment of her pro-

ceeds or value into court, would have been necessary in order to bring other creditors into concourse with the libelants; but for the mere defense of that cause it was not necessary.'

And in The Scotland, 105 U. S. 24, 24 L. Ed. 1001, it was decided that:

'It was not necessary that ship owners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if *cound* in or confessing fault, may abide a decree against them for the value of ship and freight, as found by the proofs.'

The limit of recovery is the value of the owner's interest in the ship and freight, and it seems to be clear that the beneficent purpose of the act of 1851 may be well accomplished by an answer in the state court setting up a limited liability. If the plaintiff should recover a judgment there, he would be entitled to the full value of the ship undiminished by the costs and expenses necessarily incident to the administration of the fund in this court. *All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the state court, and if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away*

from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect." (Italics ours.)

Both the Lotta and The Delaware River Ferry Co. vs. Amos, which are cited with approval by the Supreme Court of the United States in the Sandanger case, are in turn rested on the reasoning of Judge Brown in The Rosa, 53 Fed. 132, and The Eureka, 108 Fed. 672. [23]

In The Rosa, 53 Fed. 132, 133–135, Judge Brown refused to enjoin a common-law action in the state court, saying:

"There is no averment in the petition that any other claim exists, or is likely to arise against the Rosa or her owners, out of the trip referred to. There is no intimation, nor any suggestion, that any additional claim is probable. The nature of the accident, also, namely, the falling down of the passenger in the open hatch of the canal boat, was not such an accident as to affect any other person, or such as is liable to involve any other person unknown. Had any similar injury happened to any of the other passengers, there is no probability that knowledge of it would not have come to the

owners, as well as to other persons; and none such is suggested.

The case, therefore, presents the question in its simplest form whether, under the act of 1851, limiting liability, and under the sections of the United States Revised Statutes above stated, this court ought to entertain a petition like this and restrain the prosecution of a common-law suit for the recovery of damages in the state court, when there is no averment of the existence of more than a single claim, or of any probability of any other.

By section 9 of the Judiciary Act of 1789, as well as by subdivision 8 of section 563 of the United States Revised Statutes, the admiralty and maritime jurisdiction conferred upon the district courts expressly 'saves to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.' This provision must be observed in good faith. It seems to me manifestly to forbid any interference by this court with a suit in the state court, when the whole subject-matter and all the rights of both parties, upon the case as stated by the petition, can be perfectly adjudicated and preserved in the ordinary course of a common-law suit. Steamboat Co. vs. Chase, 16 Wall. 522, 533. *The limitation of responsibility provided by law can be as fully and as readily secured in a common-law suit, as in this court, where there is but a single claim against the vessel, or her owners. All that is needed in*

either court, is an answer setting up the limitation of liability under section 4283 of the United States Revised Statutes, with a statement of the value of the owners' interest in the vessel and her freight pending. The question of value will then become one of the issues in the cause; but the determination of such value is as appropriate and easy in the common-law suit as is the determination of ordinary questions of value in the usual course of common-law proceedings. To justify interference with the suitor's common-law remedy, therefore, the petition must show some needed relief against more than a single claim.

Where there are several damage claimants, or the circumstances are such that there are likely to be others at the time unknown, and where the damages are unliquidated and may exceed the value of the vessel, so that a case is [24] presented for the ascertainment of the amount of various claims of different creditors, in order to make a *pro rata* distribution among them, the common-law remedies are inappropriate and inadequate. A special proceeding is necessary for the full protection of the ship owner in such cases; and such are the cases contemplated by sections 4284 and 4285 of the Revised Statutes. The very language of these sections shows that they contemplate, and are meant to provide for, cases where there is more than one damage claimant.

It thus appears not only from the face of the statutes themselves, but from the nature of the case, the declarations and the rules of the supreme court, that the special proceeding in this court was not designed for a single claim only; but that in such a case all needed protection can be afforded by way of answer in the common-law suit; and that there is no need, therefore, to resort to an independent special proceeding in this court. The defense by answer is one of the four methods by which the statute can be availed of, as pointed out in the case of The Scotland, supra; and in that case the relief was given in that way."

In The Eureka, 108 Fed. 672, the same Judge said at page 673:

"Where suit has been brought upon one claim and the circumstances are such as to make probable the existence of other claims arising out of the same accident, as in cases of collision, or from any other circumstances of the same voyage, sections 4284 and 4285 may no doubt be rightly invoked and proceedings thereunder instituted for a *pro rata* distribution; but where there is but one known claim, and the nature of the accident or loss makes improbable any other, and the petition neither avers a *belief* in the existence of any other claim, nor shows any grounds for apprehending the existence of any other, the case seems to me to be wholly outside of the provisions of sec-

tions 4284 and 4285, and to be fully covered and provided for by defense under section 4283 by answer in the state suit. The limitation of liability is then completely and effectually available by way of defense in the state court under that section. The Scotland, 105 U. S. 24, 33, 26 L. Ed. 1001; Loughlin vs. McCaulley, 186 Pa. 517, 40 Atl. 1020. There is no need of any trustee in such a case, nor of any of the cumbrous, dilatory and expensive machinery of the special limited liability proceedings under sections 4284 and 4285.

The court cannot fail to recognize that practically the only object of applications upon a single claim like this is, to get the case away from the common-law jurisdiction and a trial by jury But this right to a common-law remedy, with its attending jury trial, is precisely the right which section 563 of the Revised Statutes expressly reserves to suitors 'in all cases where the common-law is competent to give it.'

[25]

Where there are several claims so as to require a *pro rata* contribution, no doubt a common-law remedy is not competent to give relief, because it does not include the equitable powers of the appointment of a trustee, or the summoning in of various different claimants so as to make a *pro rata* apportionment according to the various claims. But where there is but a single claim nothing of this kind is necessary. Full relief may be obtained by the ship owner

in the original action, by answer setting up the statutory limitation of liability, the value of the vessel, and making proof accordingly on the trial. Such defense by way of answer are not infrequent, as I am informed, in the state courts in this district. At this moment I have before me for decision a similar instance in this court, and such was The Scotland, 105 U. S. 24, 33, 26 L. Ed. 1001. Presumably, it is only because the common law is not competent to afford adequate relief to the ship owner by way of defense, where there are several claims requiring a *pro rata* division, that section 4284 provided for the independent special proceeding in cases 'where there are several claims,' requiring such a division.

One other incident of the independent proceeding under section 4284 and rule 55, that operates still further to the prejudice of the injured party is, that the costs and expenses of the proceeding are to be allowed to the ship owner. Thus a fund, already insufficient to make good the injured party's honest demand, is still further depleted by a cumbrous and expensive proceeding. These costs are (a) for a long and costly advertisement calling for imaginary claims having no existence; (b) a commissioner to take proof and report upon these imaginary claims, never to be presented; (c) the appointment of a trustee to take charge of the ship or its proceeds in order to provide for an imaginary *pro rata* distribution, which will

never arise; and finally for the other statutory charges in the fee bill, in a proceeding wholly unnecessary and of no benefit to any one except the ship owner, to enable him to escape a jury trial."

Although the right to a common-law remedy, with its attending jury trial, was reserved to all suitors by the Judiciary Act of 1789 (Sec. 563, Revised Statutes) "in all cases where the common law is competent to give it," Congress in 1920 expressly declared in the Merchant Marine Act (Sec. 33) that:

> "Any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages at law with the right of trial by jury."

In view of this special declaration of Congress, with respect to seamen, the claimant should not be deprived of his [26] right to a common-law remedy and a jury trial, unless the petition clearly shows that it will be impossible for the petitioner to obtain the advantages of the limited liability statutes in the state court. The petition does not allege such facts, but on the contrary, it clearly appears therefrom that the petitioner is the sole owner of the vessel in question, and that there is but a single claim against it by reason of the matters complained of.

The foregoing cases from which we have liberally quoted and which have been approved by the Supreme Court, conclusively demonstrate that there is

no occasion for the proceeding which the petitioner has instituted in this court, and that every advantage, privilege and benefit to which the petitioner is entitled under Section 4283 of the Revised Statutes, may be obtained by proper pleading in the state court.

In the recent case of Hartford A. C. C. I & Indemnity Company vs. Southern Pacific Company, 71 Law Ed. 464, Chief Justice Taft, referring to the objects and purposes of a proceeding such as the petitioner has here instituted, said:

> "The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader and a creditor's bill. It looks to a complete and just disposition of a many cornered controv*ery*, and is applicable to a proceeding *in rem*, as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."

Plainly, in the present case, there is no occasion for such a proceeding. Only one suit can possibly arise from the accident or "disaster" complained of. There is no "many cornered controv*ery*" involved requiring the administration of a court of equity. There is but a single claim and a single [27] owner, under which circumstances, as pointed out by Judge Brown, a common-law court is competent to give a full and complete remedy.

In conclusion, it is respectfully submitted that the decision of the Supreme Court in Carlisle Packing

Co. vs. Sandanger, 259 U. S. 255, 66 Law Edition, 927, approving the reasoning of the cases from which we have quoted, is conclusive on this motion, and that the restraining order should be dissolved and set aside and the claimant be permitted to prosecute his action in the state court.

Respectfully submitted,
G. F. VANDERVEER and
S. B. BASSETT,
Proctors for Claimant.

[Endorsed]: Service of a copy hereof admitted this 26th day of April, 1928.

BRONSON, JONES & BRONSON,
Proctors for Petitioner.

[Endorsed]: Filed Apr. 28, 1928. [28]

[Title of Court and Cause.]

ORDER NOTING DEFAULTS.

This Court, having heretofore on the 6th day of February, 1928, duly issued a monition against all persons claiming damages for any and all loss, damage or injury caused by, or resulting from the catastrophe alleged to have occurred on board the Diesel halibut fisher "Aloha" on or about the 27th day of May, 1927, as set forth in the libel and petition herein, citing all such persons to appear before this Court on or before the 20th day of March, 1928, at the hour of 10:00 o'clock in the forenoon, to answer said libel and petition, and to make proof of their

claim or claims on or before said time, before A. C. Bowman, Esquire, the Commissioner designated by this Court, at his office 444 Central Building, Seattle, King County, Washington, subject to the right of any person interested to question or controvert the same, and publication of said monition having been duly given, as required by the rules and practice of this court, and service of a copy thereof having been duly made, as appears by the return of the United States Marshal now on file herein, and it appearing from the records of said court that the following claim has been presented pursuant to said monition:

Claim of Winfield A. Green, by his proctor, G. F. Vanderveer, Esquire, 1011 Alaska Bldg., Seattle, King County, Washington, for damage, loss, injury, etc., in the sum of twenty-five thousand dollars ($25,000.00).

And it also appearing that due proclamation has ben made for any and all persons having, or claiming damage for any and all loss, damage and injury arising out of said alleged occurrence, on [29] return of said monition to appear and answer the libel and petition herein, and present their claims, and no other person or persons, or corporation or corporations having appeared.

Now, on motion of Bronson, Jones & Bronson, proctors for petitioner, it is

ORDERED that the defaults of all persons or corporations claiming damages for any and all loss, damage or injury caused by, or resulting from the aforesaid alleged catastrophe, and not having filed

claim as aforesaid, be, and the same hereby are noted; and it is further

ORDERED that the defaults of all persons or corporations claiming damages for any and all loss, damage or injury caused by, or resulting from the aforesaid alleged catastrophe, and not having appeared in answer to said petition, be, and the same are hereby noted; and it is further

ORDERED that the proof of all claims so filed as aforesaid be, and the same hereby is suspended, until the trial and determination of this cause.

Done in open court, this 24 day of September, 1928.

JEREMIAH NETERER,
U. S. District Judge.

[Endorsed]: Copy recd. Sept. 21/28.
VANDERVEER & LEVINSON,
Attys. for Libelant.

[Endorsed]: Filed Sep. 24, 1928. [30]

[Title of Court and Cause.]

ORDER DENYING CLAIMANT'S MOTION TO DISSOLVE RESTRAINING ORDER AND DISMISS PETITION.

This matter having come regularly on for hearing on the 12th day of July, 1928, before the undersigned, upon the motion of claimant to dissolve restraining order and dismiss the petition herein, the

petitioner appearing by his proctors, Bronson, Jones & Bronson, and the claimant appearing by his proctor, G. F. Vanderveer, Esq., and the Court having considered the written memorandum of points and authorities submitted for and against said motion, and having duly heard the argument of counsel, and being fully advised in the premises, and having on said 12th day of July, 1928, orally announced the denial of said motion, and each part thereof, it is now

HEREBY ORDERED, ADJUDGED AND DECREED that claimant's motion to dissolve restraining order herein, and his motion to dismiss the petition herein, each be, and they are hereby, denied, to all of which claimant duly excepts, and exception is hereby allowed.

Done in open court, this 24th day of September, 1928.

JEREMIAH NETERER,
U. S. District Judge.

O. K. as to form; notice of presentation waived.

VANDERVEER & LEVINSON,
Proctors for Claimant.

[Endorsed]: Filed Sep. 24, 1928. [31]

[Title of Court and Cause.]

EXCEPTIONS TO PETITION.

Winfield A. Green, respondent herein, excepts to the petition herein, upon the following grounds:

I.

That the facts averred in the petition are insufficient to entitle the petitioner to a limitation of his liability.

II.

That the facts averred in the petition show that the above-entitled court is without jurisdiction; and that the Superior Court of the State of Washington has proper jurisdiction of the parties and subject matter of respondent's claim.

Dated this 14th day of January, 1929.

SAMUEL B. BASSETT,
Proctor for Respondent.

Service of the foregoing by the receipt of a copy thereof, acknowledged this 14th day of January, 1929.

BRONSON, JONES & BRONSON,
Proctors for Petitioner.

[Endorsed]: Filed Jan. 22, 1929. [32]

[Title of Court and Cause.]

AMENDED ANSWER.

Answering the petition for exemption from and limitation of liability herein, the claimant, Winfield A. Green, admits, denies and alleges as follows:

I.

He denies each and every allegation of the fourth paragraph of said petition.

II.

He denies each and every allegation of the fifth paragraph of said petition, and particularly denies that by the terms of the oral agreement therein referred to, the claimant agreed to embark upon a joint and common fishing venture, and with respect to this, alleges that said agreement was a contract of employment whereby claimant agreed to work for the petitioner as engineer and fisherman on said voyage.

III.

The claimant denies each and every allegation of the eighth paragraph of said petition.

IV.

The claimant denies each and every allegation of the ninth paragraph of said petition, and particularly denies that he was guilty of any negligence approximately contributing [33] to his said injury. That with respect to the matters alleged in said paragraph, claimant alleges the facts to be as follows:

(1) That in fishing for halibut in said banks the petitioner employed a long, heavy ground-line, to which, at intervals of thirteen feet, heavy halibut fish-hooks were attached by five-foot fishing lines and whenever it was desired to raise the ground-line for the purpose of removing fish, one end was passed around a power-driven capstan located amidships, by means of which the line was then hauled aboard the vessel over a large fourteen-inch roller located on the starboard rail. That the starboard backstay

was secured to a heavy metal strap bolted in a vertical position to the side of the vessel in such a manner that it was raised about half an inch above the planking, and the petitioner negligently placed the roller, over which the ground-line was hauled aboard said vessel, within three or four inches of said strap, and negligently failed to cover said strap or take any other precaution to keep the fish-hooks from catching on the same, as a natural and proximate result whereof, as the petitioner well knew, or in the exercise of reasonable care should have known, there was danger that, as the ground-line was hauled inboard across said roller, the halibut hooks would catch on said backstay strap and, when torn loose by the winch, would fly back into the faces of the fishermen who were raising and stowing the line.

(2) That on the 13th day of May, 1927, as a natural and proximate result of the petitioner's aforesaid negligence, while the claimant and other fishermen were engaged in hauling the ground-line inboard said vessel in the manner hereinabove described, one of the fish-hooks caught on said backstay strap, and, when torn loose therefrom by the capstan, it flew back into the claimant's face, striking him in the left eye and destroying the sight thereof. [34]

(3) That at the time of receiving said injuries the claimant was an able-bodied man of the age of forty-nine years, capable of earning $200.00 per month as a marine engineer and fisherman. That as result of said injuries he was totally incapaci-

tated from performing any gainful labor for a period of three months to his damage in the sum of $720.00; that the sight of his left eye has been permanently destroyed; that the claimant is informed and believes, and therefore alleges that his right eye will be permanently impaired; he has suffered intense pain from said injury and that his left eye has become shrunken and unsightly, causing him to suffer intense shame and humiliation, to his damage in the total sum of $25,000.00.

V.

Answering the tenth paragraph of said petition, the claimant admits that on the 11th day of October, 1927, he commenced an action in the Superior Court of the State of Washington for King County against the petitioner to recover damages for said injuries, and that said cause is now pending and undetermined in said court.

VI.

Claimant denies each and every allegation of the eleventh paragraph of said petition, and particularly denies that any other claims, suits or actions can possibly arise by reason of the disaster aforesaid.

VII.

Answering the twelfth paragraph of said petition the claimant admits that the petitioner is the sole owner of said vessel M. S. "Aloha," but denies all other allegations of said paragraph. [35]

VIII.

Answering the thirteenth paragraph of said peti-

tion, the claimant admits that the petitioner desires to claim the benefits of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the Acts amendatory thereof, and supplemental thereto, but denies that the petitioner is entitled to the benefits of said laws for the reason, that during all the times referred to in the petition, the petitioner was the captain and master of said vessel "Aloha," as well as its owner, and that the fishing voyage referred to was at all times under the petitioner's sole personal command, direction and supervision; and that the accident and injury to the claimant was the proximate result of the petitioner's personal negligence and with his actual knowledge and privity.

Further answering the thirteenth paragraph of said petition, claimant denies that this proceeding is necessary or proper to obtain the benefits of said laws and statutes, and with respect to this, alleges that the matters stated in said petition should be pleaded in answer to the action commenced by the claimant in the Superior Court of the State of Washington for King County, hereinabove referred to.

IX.

Claimant denies the allegations of the fourteenth paragraph of said petition.

WHEREFORE, the claimant prays as follows:

1. That the petition of said Axel Langnes be dismissed; that the restraining order herein be dissolved; and the claimant be permitted to further prosecute his action against petitioner in the Su-

perior Court of the State of Washington for King County, or [36]

2. In the event that the foregoing prayer is denied, that the claimant's claim for damages be allowed, and that said Diesel halibut vessel "Aloha" be condemned and sold to pay the same, and for all further relief as in law and justice he may be entitled to receive.

SAMUEL B. BASSETT,
Proctor for Claimant.

State of Washington,
County of King,—ss.

Winfield A. Green, being first duly sworn on oath, deposes and says: That he is the claimant in the above-entitled action; that he has read the foregoing amended answer, knows the contents thereof and believes the same to be true.

WINFIELD A. GREEN.

Subscribed and sworn to before me this 10th day of January, 1929.

SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the foregoing amended answer, by the receipt of a copy thereof, acknowledged this —— day of January, 1929.

_____,
Attorney for Petitioner.

[Endorsed]: Filed Jan. 22, 1929. [37]

[Title of Court and Cause.]

TRIAL.

Now on 22d day of January, 1929, Robert Bronson and G. E. Steiner appearing for the petitioner and Samuel B. Bassett, appearing for the claimant, Winfield A. Green, respondent, herein, this cause is called for trial. The petitioner not objecting, leave is granted to file an amended answer, and the same is filed. Exceptions are presented to the petition, but answer having been filed the Court declines to hear the same, noting an exception to respondent. Counsel for petitioner makes opening statement of case. Witnesses for petitioner are sworn and examined as follows: Axel Langness. Petitioner's exhibit numbered 1 is admitted in evidence. Petitioner rests on question of limitation. Claimant moves to dismiss the petition. Said motion is denied and exception is noted. Respondent's witnesses are sworn and examined as follows: Winfield A. Green, Jacob Peterson, Dr. W. F. Cunningham, Ed Breiland, Severin Holmnes, Axel Edwards. Respondent's exhibits numbered A–1 to A–7, inclusive, are admitted in evidence. Petitioner's exhibit numbered 2 is admitted on cross-examination. Recess is had to 2 P. M., at which time all parties being present the trial is resumed. Respondent rests. Petitioner challenges the sufficiency of respondent and claimant's evidence on question of total exemption. Counsel for respondent and claimant renews motion to dismiss. Both are argued

together. The Court rules that there is no negligence shown on the owner's part and dismisses the claim of respondent. An exception is noted to the claimant. The motion of the respondent to dismiss [38] the petition is denied and an exception is noted. Notice of appeal is given orally and formal notice will be filed later.

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[Title of Court and Cause.]

TRANSCRIPT OF TESTIMONY. [40]

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[Title of Court and Cause.]

BE IT REMEMBERED, that heretofore, and on, to wit, January 22, 1929, the above-entitled petition came on for hearing in said court, and before Honorable JEREMIAH NETERER, the Judge thereof,—

The petitioner herein appearing by Messrs. BRONSON, JONES & BRONSON, Mr. G. E. STEINERT, Proctors for Petitioner.

And the claimant herein, Winfield Green, appearing by Mr. GEORGE F. VANDERVEER, Mr. S. B. BASSETT, Proctors for Claimant.

And thereupon, upon the hearing of said petition, proceedings were had and done as follows, to wit:

The COURT.—Are the parties ready in this matter of the petition of Axel Langnes, halibut vessel "Aloha"?

Mr. BASSETT.—In this case, which is on the calendar for trial this morning, we have moved for leave to file an amended answer to the petition to

limit liability. [42—1] It was served some time ago; but I have not had an opportunity to have a formal order entered allowing the filing of it.

The COURT.—Is there any objection?

Mr. BRONSON.—There is no objection.

The COURT.—It may be filed. How long will this case take, Gentlemen?

Mr. BRONSON.—It will probably take the better portion of the day.

The COURT.—Go ahead then with this case.

Mr. BASSETT.—On the 14th of January, 1929, I served notice of substitution in this case. Heretofore, the respondent has been represented by Mr. Vanderveer; but on the 14th of the month I was formally substituted; and I ask your Honor for an order; at that time, no formal order was entered.

The COURT.—You are substituting for Mr. Vanderveer?

Mr. BASSETT.—Yes.

The COURT.—Have you Mr. Vanderveer's withdrawal?

Mr. BASSETT.—No; we just had an oral understanding; and I served my notice on counsel for the petitioner.

The COURT.—Well, I don't know then whether Mr. Vanderveer is in or out unless he is here.

Mr. BASSETT.—I will bring a withdrawal from him at noon.

The COURT.—Yes; I think that would be better. But at this time, you may be entered as counsel for the claimant.

Mr. BRONSON.—The record shows the appearance of Mr. Vanderveer in the beginning. [43—2]

The COURT.—Well, all right, then, you had better have a formal withdrawal from Mr. Vanderveer, and then you can be substituted properly.

Mr. BASSETT.—At the time Mr. Vanderveer withdrew, I was formally substituted, and filed exceptions to this petitioner. Heretofore, Mr. Vanderveer has asked that the petition be dismissed on the ground that there was only one claimant involved here; and your Honor overruled that motion. I intended to substitute a petition for dismissal on the ground that the petition did not state facts—

The COURT.—(Interrupting.) Have you answered in this case?

Mr. BASSETT.—Yes.

The COURT.—Well, then, I am not going to hear your exceptions.

Mr. BASSETT.—Well, I do not want to take your Honor's time because it clearly appears from the petition, and the answer does not deny it, that the owner of the vessel is the party who is charged with the negligence, by which plaintiff was injured, and they do not deny that fact. If there is any negligence in this case, it is the owner's.

The COURT.—You have answered, and the Court is not going to take up your exceptions now. That would be a matter of proof. You do not want to take those up after you have answered. We will have to dispose of it on the facts.

Mr. BASSETT.—That is the only thing that is charged. I do not want to take up your Honor's

time [44—3] with it. We will submit evidence and go ahead.

Mr. BRONSON.—This is a petition for exemption for or limitation of liability—

The COURT.—I read over the pleading yesterday.

Mr. BRONSON.—Then I will not state the substance of the pleadings, except to call your Honor's attention briefly to what we expect to show. In this case, the value of the vessel, her engines, freight and earnings have been agreed to by stipulation in the sum of $5,000. We will expect to show that the claim presented against the owner of this vessel in the state court was some $25,000; and that the vessel was seaworthy in all respects, and properly officered and manned, and etc., and we expect the evidence to show that this accident was not proximately caused, in any sense of the word by any of the vessel's structural substance; and that all her equipment was in good order and repair. And in answer to the petition of claimant in this case, we allege that the accident was caused solely and proximately by the wilful negligence of claimant himself, and by his disregarding the positive instructions given to him, and proceeding with his work in an unsafe and dangerous manner, although a safe and proper manner was provided for him.

Mr. BASSETT.—For the purpose of this petition, it is our contention that the negligence charged here was the personal negligence of the owner himself.

The COURT.—You said that a while ago.

Mr. BASSETT.—Yes, your Honor, and that is our [45—4] contention.

* * * * * * * * *

And thereupon, to sustain the allegations of his petition herein, petitioner offered the following oral and documentary evidence, to wit:

TESTIMONY OF AXEL LANGNES, IN HIS OWN BEHALF.

AXEL LANGNES, the petitioner herein, being duly sworn as a witness in his own behalf, testified as follows, to wit:

Direct Examination.

(By Mr. BRONSON.)

Q. State your full name. A. Axel Langnes.

Q. You are the petitioner in this case, Captain Langnes? A. Yes.

Q. Where do you reside?

A. 4234–8th Avenue Northeast.

Q. That is in Seattle, Washington? A. Yes.

Q. On the 13th day of May, 1927, at the time of the filing of this libel, were you the owner of the gas screw "Aloha"? A. Yes.

Q. What is the general size, type and style of that vessel?

A. She is 56 feet long, sharp bow and round stern.

Q. For what purpose was she built and used? [46—5] A. For halibut fishing.

Q. What was her tonnage?

(Testimony of Axel Langnes.)

A. Nineteen net; twenty-eight gross.

Q. She was a vessel licensed in the fisheries?

A. Yes.

Q. Under the laws of the United States?

A. Yes.

Mr. BRONSON.—If the Court please, we offer in evidence as Petitioner's Exhibit No. 1, a certified copy of the records of the United States Customs-house.

Mr. BASSETT.—No objection.

The COURT.—It may be admitted.

(Document received in evidence and marked Petitioner's Exhibit No. 1.)

Mr. BRONSON.—Certified by the Deputy Collector of Customs at this port.

Q. In the month of February, 1928, where was the "Aloha"? A. She was in Lake Union.

Q. On the 4th day of February, 1928, was she in Lake Union? A. Yes.

Q. That is a body of water that is within the city limits of the city of Seattle, is it not?

A. Yes.

Q. On the 13th day of May, 1928, do you remember where the vessel was?

A. On the 13th of May, 1928?

Q. I should have said 1927. On the 13th day of May, 1927.

A. She was approximately five miles due east of Cape St. James, on Queen Charlotte Islands.

The COURT.—Cape what? [47—6]

(Testimony of Axel Langnes.)

A. Cape St. James, Queen Charlotte Islands, British Columbia.

Q. What was the vessel employed in at that time?

A. Fishing for halibut.

Q. From which port did she sail on that particular voyage? A. From Seattle, Washington.

Q. Do you remember the date when she sailed?

A. Approximately the 8th day of May.

Q. The 8th day of May, 1927? A. Yes.

Q. Who was in command of the vessel at that time? A. I was.

Q. You sailed with the ship, did you?

A. Yes.

Q. What crew did you carry at the time?

A. I carried a crew of five men, with myself, inclusive.

The COURT.—How many men did you carry?

A. Five men with me.

Q. Of what did the crew consist? Fishermen, engineers, or what?

A. In fishing we always have one cook and one engineer; but they are included in the fishing.

Q. You mean that they perform the duties of cook and engineer, and also the duties of fishing?

A. Yes.

Q. Did you sign on the crew with articles on that particular voyage? A. No. [48—7]

Q. On what basis are the men employed on the ship?

A. They take part in the expense of going out, and get their share, according to the catch after

(Testimony of Axel Langnes.)

substracting all of the expenses that are incurred from time to time.

Q. Do they sign any written agreement or contract with you at the time they take on their employment on the vessel? A. No, they did not.

Q. Have you been engaged in the halibut fishing industry for some time since 1906? A. Yes.

Q. Are you familiar with the custom, practice, and terms, on which men sign on these vessels for halibut fishing out of Seattle?

A. Well, they don't sign on.

Q. Are you familiar with the practice under which they go out on vessels? A. Yes.

Q. Is that practice you have just stated as taking place on this vessel the usual and customary practice? A. Yes.

Q. That is, the men receive as their compensation a certain proportion of the earnings of the vessel? A. Yes.

Q. What are those proportions?

A. When we go out, a standard amount is a certain amount of the fish we take when it arrives in port, where we propose to sail; and whatever the final amount amounts to, it is divided up, first the boat takes one-fifth of the gross amount— [49—8]

The COURT.—How much?

A. One-fifth.

The COURT.—One-fifth. What else?

A. Then the expense is deducted; and after that

(Testimony of Axel Langnes.)

the balance of the amount left is divided up among the whole crew.

The COURT.—Equally to all?

A. Yes.

The COURT.—Including the captain?

A. Yes.

Q. Does the vessel receive a share of that net earning?

A. She receives one-fifth of the gross earnings.

Q. And then the captain and the other seamen share equally in the net balance, the net residue?

A. Yes.

Q. What sort of engine was this vessel powered with?

A. She had Diesels, full Diesels. Atlas-Marshall full Diesel.

Q. What general equipment did you have on board at the time you sailed from Seattle on the 8th day of May, 1927?

A. We had the gear, supplies, such as bedding, ice, groceries, water and oil.

Q. Did you have the customary supplies and equipment on board your vessel for that class of voyage? A. Yes.

Q. How many voyages do you make in a year on an average? A. An average of fourteen.

Q. Fourteen voyages a year?

A. No, that does not include the full year. [50—9]

Mr. BASSETT.—I interpose an objection at this time. I object to counsel leading the witness, and

(Testimony of Axel Langnes.)

asking him whether the equipment was customary. I think we should be advised as to what the equipment was.

The COURT.—Proceed.

Mr. BASSETT.—Exception.

Q. Will you answer the question. What did he say?

(Question and answer read.)

A. We are governed by the Government and operate nine months out of the year for halibut, and three months out of the year laid up.

Q. You had on board this vessel a man by the name of Green? A. Yes.

Q. Do you remember his full name?

A. I do not.

Q. Do you recall whether it was Winfield Green?

A. Winfield Green. That is right.

Q. You state in your petition that on the 13th day of May, 1927, an accident occurred on board your vessel at the location you mentioned, north of Queen Charlotte Islands. Such an accident took place, did it? A. Yes.

Q. Was there a claim subsequently made against you by Mr. Green as the result of that accident?

A. Yes.

The COURT.—What date was that?

A. 13th of May, 1927.

Q. Where was that claim presented against you?

A. In the state court. [51—10]

Q. Do you remember the amount of that claim?

A. $25,000.

(Testimony of Axel Langnes.)

Q. And that claim was active and pending against you at the time you filed your petition in this court, was it? A. Yes.

Q. Is it your desire, Captain Langnes, to claim and receive the benefits of the Revised Statutes of the United States with reference to the limitation of liability? A. I do not get that.

Q. I say, is it your desire to secure the benefits of the Revised Statutes of the United States relating to the limitations of the vessel and owner's liability? A. Yes.

Q. You desire to contest that liability in the proceeding as well, do you? A. Yes.

Q. Do you recall the day on which this particular voyage terminated or ended?

A. May 27, 1927.

Q. At what port did that take place?

A. Seattle.

Q. Seattle, Washington? A. Yes.

Q. Mr. Green, the claimant, whom you have mentioned, left the vessel at that time, did he?

A. No, he left the vessel in Prince Rupert. We had to go in with him as he was injured.

The COURT.—How is that?

A. We had to go in to port with him when he was injured; and we went to the nearest port, which was [52—11] Prince Rupert, British Columbia.

Q. You mean you made an emergency port call as the result of the injury sustained by Mr. Green?

A. Yes.

(Testimony of Axel Langnes.)

Q. On what day was he put ashore in Prince Rupert, do you recall? Just approximately, if you do not remember the exact date?

A. I think it was May 14th. No, May 15th. May 14th, 12:00 o'clock, in that neighborhood.

The COURT.—Practically at the time, or shortly thereafter?

A. Yes.

Q. You proceeded into Prince Rupert immediately with him? A. Yes.

Q. Were you the sole owner of this vessel at that time? A. Yes.

Q. And you are likewise the sole owner of, the owner of the whole vessel, in February, 1928, when you filed your petition in this court? A. Yes.

Q. Will you just state to the Court what inspection was made of your vessel prior to proceeding on that voyage from Seattle on May 8, 1907?

A. It was inspected by the Board of Surveyors.

Q. What purpose?

A. For being seaworthy in every way and condition.

Q. That was in connection with marine insurance, was it? A. Yes.

Q. Was the vessel insured after her survey?

A. Yes. [53—12]

Q. Where was that vessel built?

A. At the Fisherman's Dock in Ballard.

Q. In what year? A. 1924.

Q. Was she the same in construction and design

(Testimony of Axel Langnes.)

and structural equipment at the time of this accident as when built? A. Yes.

Q. Was she in good operating condition as a vessel? A. Yes.

Q. You had no trouble with your structural equipment, such as masts, or engines or hull, in the operation of the vessel, did you?

A. No, sir.

Q. In any way? A. No.

Mr. BRONSON.—I think the petitioner will rest on the question of limitation at this time. I suppose it will be in order for us to proceed in the customary manner, and rebut claimant's proof as to liability.

The COURT.—Yes.

Cross-examination.

(By Mr. BASSETT.)

Q. Now, when this accident occurred you were on board the vessel? A. Yes.

Q. You were the captain and master of the vessel? A. Yes. [54—13]

Q. Everything done on board that vessel was done under your personal direction?

A. We have a man—

Q. (Interrupting.) Answer the question yes or no. Was it under your personal direction?

Mr. BRONSON.—I do not know that that question is susceptible of a yes or no answer.

Mr. BASSETT.—He can explain it afterwards, if he wants to.

(Testimony of Axel Langnes.)

The COURT.—Just answer it.

A. Yes or no?

The COURT.—Well, if you can answer it yes or no do so.

A. Well, yes or no don't come in according to my understanding.

Q. Read it again, Mr. Reporter.

(Question read.)

A. Well, you ask me to say yes or no. It don't apply to it. I cannot make such a statement and state a true statement.

Q. Let me ask you another question. You were in full command of the men, weren't you?

A. Yes.

Q. They obeyed your orders. When you told them to do things, they did them?

A. Not all the time.

Q. You could enforce your orders, could you not, as captain of the vessel?

The COURT.—Well, that is a matter of argument.

Q. You told the men how to handle the gears? [55—14] A. Yes.

Q. You tell them how to fish when fishing?

A. Yes.

Q. And when to stop? A. Yes.

Q. You tell them how to arrange the gear?

A. How to arrange the gear.

Q. How to arrange it? A. Yes.

Q. And how to use it? A. Yes.

(Testimony of Axel Langnes.)

Q. You were personally present when this accident occurred, weren't you? A. Yes.

Q. And Mr. Green was in the performance of his duties when he was injured? A. Yes.

Mr. BASSETT.—Will you mark these Respondent's Exhibits 1 to 6, respectively.

(Photographs marked Respondent's Exhibits 1 to 6, inclusive.)

Q. Handing you Respondent's Exhibit 2, I will ask you to state whether or not that is your vessel, the "Aloha"; a small picture, and a larger one being the enlargement of the smaller picture above it.

A. (After examining exhibit.) Yes.

Q. That is the boat? A. Yes.

The COURT.—You showed all of these exhibits to counsel? [56—15]

Mr. BASSETT.—Yes, I am going to show them to him.

Q. Handing you Respondent's Exhibits "A-1" and "A-2," I will ask you whether or not that is a picture of the port side of the boat "Aloha." Both of these are pictures of the same side?

A. It looks as if it is.

Q. And this one also? A. Yes.

(Photographs handed to the Court for inspection.)

Q. Respondent's Exhibit "A-4" is also a view of that same side, showing what is known as the roller? A. Yes.

(Testimony of Axel Langnes.)

Q. Handing you Respondent's Exhibit "A-5" and "A-6," I will ask you to state whether or not those are views of the opposite side of the vessel to the port side. Is that the port side or the starboard side?

A. This is the port bow (indicating).

Q. And the other is the starboard that you were talking about before? A. Yes.

Q. What are these vertical lines, these three lines that run perpendicularly along the side of the vessel? A. They are called the chain plates.

The COURT.—Chain plates?

A. Yes.

Q. You have three of those on each side of the vessel? A. Yes.

Q. In a corresponding position on each side?

A. Yes.

The COURT.—Show me those. [57—16]

A. (Witness shows Court.)

Mr. BASSETT.—Those chain plates are very clearly shown there.

Q. And you fish only from one side of the vessel?

A. Yes.

Q. What side do you fish from?

A. The starboard side.

Q. On the starboard side you have an implement that is called a roller? A. Yes.

Q. Over which the line is pulled when you pull up the ground-lines? A. Yes.

(Testimony of Axel Langnes.)

Q. And along the side of the vessel, under the roller, you now have a zinc plate covering the arm nearest the roller?

A. Yes; I have a sheet-iron plate.

Q. And that covers that iron, extends all the way over to the second one? A. Yes, that is correct.

Q. That is the way your vessel looks to-day?

A. Yes.

Q. That sheet iron extends all the way over to the second one.

The COURT.—Where is the sheet iron?

A. (Indicating to the Court.) Right along here, your Honor.

The COURT.—Right here (indicating)?

A. Yes.

Q. That shows where it is there? [58—17]

A. Yes.

Q. Now, what is the purpose of that plate? Why did you put it on the side of the vessel?

A. It is to eliminate the hooks, and protect the vessel.

Q. That is to keep *a* hooks from catching on the backstay lines? A. No, sir.

Q. Isn't that why you put it on? A. No.

A. What did the hooks catch in?

A. They catch in the soft wood.

Q. They will catch in the crevices where the iron is up against the wood, don't they?

A. I don't get what you mean.

Q. Here is the iron. (Indicating.) That is not covered with zinc?

(Testimony of Axel Langnes.)

A. It is placed on top of the wood.

Q. That leaves a crack between the iron and the wood? A. No.

Q. Don't the hooks catch in that?

A. It don't leave a crack.

Q. It leaves something, don't it, where the iron joins the wood?

A. It catches right flush up against the stay.

Q. It leaves the corners sticking up?

A. No; the corners are rounded.

Q. Why did you put zinc over the iron?

A. For no material purpose, except merely the reason this sheet iron was extending up to the second chain plate. [59—18]

Q. When was it extended? After this accident, or before?

Mr. BRONSON.—Just a minute. The witness is answering why he did something; and I would like him to be allowed to finish his answer.

Mr. BASSETT.—Didn't he answer it fully. I thought he had?

A. I beg your pardon.

Mr. BASSETT.—Read what he said.

(Record read.)

A. Maybe—pardon me—this was placed here on July 27, 1927.

Q. How many months after the accident?

The COURT.—Anyone can see that.

Mr. BASSETT.—About three months. Very well, your Honor.

(Testimony of Axel Langnes.)

Q. Mr. Green had complained about this, hadn't he? A. I beg your pardon?

Q. Mr. Green had complained about this, hadn't he, and told you that zinc plates should cover this backstay iron aft this very thing? A. No, sir.

Mr. BRONSON.—That is objected to as immaterial.

Q. You were standing right there at the time this accident happened, weren't you?

A. I was in the pilot-house performing my duties.

Q. When you were standing there, did you see the accident when it happened? A. Yes.

Q. You saw it? A. Yes. [60—19]

Q. Now, Mr. Green's duty aboard that vessel was engineer and fisherman? A. Yes.

Q. He was engineer, and also went out to handle this line when it was being hauled aboard?

A. Yes.

Q. The ground-line is fastened to the winch, and the winch pulled it in, didn't it?

A. It is brought around a sheave with a groove in it; and that groove is forward—has a capture to hold the ground-line as it comes around the sheave, if you know, otherwise it would jump off of this when it was hauled in over the roller.

Q. Referring to Respondent's Exhibit "A–4" on top of the railing, to the right of this roller, there is a hole there in the railing. What is that hole for?

A. That is the place for the roller when we are working gear.

(Testimony of Axel Langnes.)

Q. As the roller is worked in there, it has to be inserted in there, put through holes right alongside?

A. Yes, where they go down.

Q. Now, you use the third hole?

A. That is the place we put it.

Q. But you were not using the third hole at the time the accident occurred, were you? A. Yes.

Q. At the time Mr. Green was injured?

A. Yes.

Q. It was not over here (indicating)?

A. It was from there to aft; yes. [61—20]

Q. You are sure about that?

A. I answered yes.

Q. Is it not a fact that Mr. Green complained and some of the men wanted to use this third hole, and you insisted on using these first two? A. No.

Q. And the reason they complained was there was a danger of a hook striking on these irons; is that not so? A. No, sir.

Mr. BASSETT.—Now, on that testimony, we ask that this petition be dismissed, for the reason—

The COURT.—(Interrupting.) Let us finish the case. The Court is not going to entertain a motion or other step in the case at this time. Wait until it comes to arguing it.

Mr. BASSETT.—I do not want to take up the Court's time unnecessarily.

The COURT.—You may proceed.

Q. Do you recall when these suits were started in the state court?

A. No, I don't remember the exact date now.

(Testimony of Axel Langnes.)

Q. When did you petition to limit your liability?

The COURT.—That will show on the record here.

Q. Was it after that suit was started in the state court, or before? A. I think it was afterwards.

Q. Is it not a fact the case in the state court was set for trial at the time you petitioned this court to limit your liability?

Mr. BRONSON.—I do not see the materiality of it. [62—21]

The COURT.—Objection sustained. I think this shows when it was in court at the time.

Q. Now, you say the boat gets a one-fifth of the gross earnings before anybody draws anything out?

A. Yes.

Q. Then, before anybody draws any pay at all, you pay all of the expenses? A. Yes.

Q. And out of what is left you all share in equally? A. Yes.

Q. Did Green share in anything after he was injured?

A. He shared according to the fish we had in the hold up to the time he was injured.

Q. Up to the time he was injured; but he shared in nothing that you caught after he was injured?

The COURT.—That follows anyway.

Q. Did you ever pay any of his medical expenses?

Mr. BRONSON.—Objected to as immaterial.

The COURT.—Objection sustained.

Mr. BASSETT.—This is a joint enterprise. That is what we allege in here.

(Testimony of Axel Langnes.)

The COURT.—That is not a matter to be considered here. If he is liable, he could not be limited here. That would be another matter entirely.

Mr. BASSETT.—That is all.

(Witness excused.)

Mr. BRONSON.—That is our case on the question of limitation. [63—22]

Mr. BASSETT.—Now, I wish at this time to make a motion, and I would like to read from one or two authorities from the Supreme Court—from the Circuit Court of this district on that question. If it is shown, if there is a question whether or not the negligence alleged is that of the owner himself, this Court cannot determine general liability, but must dismiss the petition and permit the respondent to proceed in the forum in which he instituted his action.

The COURT.—I think under all of the conditions plead here, I will hear you; and you may cite your authorities.

(Argument of counsel.)

The COURT.—The motion must be denied on the evidence upon the record as now made.

Mr. BASSETT.—Exception.

The COURT.—Were you about to say something more?

Mr. BASSETT.—No, your Honor.

The COURT.—If the owner was negligent, it does not appear in the record, then the cases cited have no application here, none whatever. The motion will be denied.

(Testimony of Winfield Arlow Green.)

Mr. BASSETT.—We accept and ask leave to renew the motion after we put in our evidence.

The COURT.—Is there anything else?

Mr. BASSETT.—I want to put in my evidence now.

The COURT.—You may proceed.

And thereupon, the claimant, herein, to sustain the issues in his behalf, introduced the following oral and documentary evidence, to wit: [64—23]

TESTIMONY OF WINFIELD ARLOW GREEN, IN HIS OWN BEHALF.

WINFIELD ARLOW GREEN, the claimant herein, being called and first duly sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. State your full name.

A. Winfield Arlow Green.

Q. Were you ever employed on board the "Aloha"? A. I was.

Q. When was that, Mr. Green?

A. Well, I don't just remember the time I shipped on her.

The COURT.—It was the time that has been fixed here?

A. Yes, it was in May, 1927.

Q. In the spring of 1927? A. Yes.

(Testimony of Winfield Arlow Green.)

Q. Who employed you? A. Captain Langnes.

Q. What were your duties on board the boat?

A. Engineer and fisherman.

Q. Is that the following, the calling that you have followed all of your life? A. I have.

Q. Well, for how long?

A. Well, pretty nearly 20 years, I have been fishing. Before that I worked as engineer off and on on mostly gas engines. This was my first vessel, and I told him that.

The COURT.—How is that?

A. This is the first vessel engine I ever operated [65—24] running; I told him that; and he knew that when I shipped. He said he had made a good many engineers, and he thought he could make one out of me.

Q. What were your duties?

A. To look after the engine, and fishing and steering, and general work aboard the vessel, the same as usual.

The COURT.—There is no dispute about this, is there? There is no use in taking up the time in having him go over that again?

Mr. BASSETT.—No, there is no dispute.

A. No, I am not, your Honor.

Q. Which side of the boat does Exhibit "A–5" show? A. The port side.

Q. Which side of the vessel does Exhibit "A–4" show? A. The starboard side.

Q. What is that instrument here that is forward the rail? A. That is the roller.

(Testimony of Winfield Arlow Green.)

Q. What is that used for?

A. That is the rig used for taking in gear by winch.

Q. What is this gear you see here?

A. That is the gear we used on our fishing.

Q. What is this heavy line?

A. That is the ground-line we use in fishing.

Q. Will you fasten that so we can see it?

The COURT.—Go right down and lay it down there.

Mr. BASSETT.—I will have this marked Respondent's Exhibit "A–7," consisting of a ground-line.

A. (Indicating.) This is fastened on the ground-line.

The COURT.—What is the purpose of that?

Mr. BASSETT.—I just want to show how this happened. [66—25]

Q. Now, the heavy line is called what?

A. The ground-line.

Q. What is this lighter line that has a hook on it?

A. That is a gangion.

Q. Now, there are how many gangions fastened to the ground-line? A. One every thirteen feet.

Q. How long is the gangion on the usual gear?

A. Well, that is pretty near standard.

Q. On the day you were injured, were the gangions standard length?

A. No, they were longer.

Q. How much longer were they?

(Testimony of Winfield Arlow Green.)

A. That is hard to determine; but every one a full fathom; all I could reach this way (indicating). Supposed to be 50 fathoms, and there were 51 or 52 in the box.

Q. Now, the hook on the end of this gangion, is that the same thing in size, is that the same in size as the one that caused the injury to your eye?

A. Yes, I believe that is an exact duplicate. But this is old gear, and that was new. It happened to be a new hook, and that was very favorable, because it was not rusted.

Mr. BRONSON.—That was new gear?

A. Yes, it was a new hook that went into my eye. That is where I was lucky.

Q. What were you doing at the time of the accident?

A. I was clearing these gangions from the ground-line.

Q. This line was coming in aboard?

A. Yes, when the heave is on the gear, this gear rolls and runs the line right around it. Then we have to stand, [67—26] in order to pay this gear out again, we stand, when it comes in over this roller, and catch your hand in here, and draw this clear, and around that (demonstrating). You see, there is a big strain on, and that is when it twists up the most; and sometimes you have to use quite a bit of force, and the sooner you clear them, the easier they clear, or else they catch, too.

Q. The winch hauls in the ground-line; and as

(Testimony of Winfield Arlow Green.)

the line comes in, you stand there and you unravel these gangions from the ground-line? A. Yes.

Q. I suppose that every once in a while there is a fish on one of these hooks as it comes aboard?

A. Yes, they catch fish that way.

Q. How fast is that coming in over the roller, and over the side of the vessel?

A. All the way from 15 to 28 minutes.

Q. How long a line is it?

A. The standard gear is 1,800 feet, approximately.

The COURT.—It takes 1,800 feet about half an hour to come on board?

A. Well, we usually take it in less time than that. At the time this accident happened, to the best of my knowledge, I should judge it was around 22 minutes we took in 1,800 feet.

Q. And at the time this line was being hauled in, you were standing clearing these gangions?

A. Yes, clearing them as they were being hauled in.

Q. On both sides of the vessel, about midship there are three vertical irons; what do you call them? [68—27]

A. Well, chain plates; I believe that is the trade name for them, the proper name.

Q. Chain plates? A. Yes.

Q. Respondent's Exhibit "A-1," "A-3" and "A-4," show that the chain plates near the roller is covered with a zinc plate in the pictures?

A. Yes.

(Testimony of Winfield Arlow Green.)

Q. Was that iron covered with a zinc plate at the time of your injury? A. No, sir.

Q. It was not? A. No, sir.

The COURT.—That was all testified to by the captain that it was not put on there until after the accident happened.

Mr. BASSETT.—Yes, I just wanted to have him confirm it.

Q. Respondent's Exhibit "A–4" shows a third hole here alongside of the roller. Was the roller inserted in that third hole at the time of the accident?

A. No; to the best of my knowledge it was not used there until I came on deck—

Q. (Interrupting.) Just a minute. You have answered the question; and I will ask you another.

Was the roller in the identical position shown in that exhibit at the time of the accident?

A. It was, to the best of my knowledge.

Q. Had this third hole been used?

A. Not while I was on the ship; not that I remember. [69—28]

Q. Did the men attempt to use it?

A. Yes, came on deck to man the engine, and one of the boys was putting the roller in that hole, and the captain said, "Tell him to put it in the forward hole," asked him why, and he said it would injure his gear, it would cause it to twist up too much.

Q. That is what he said, and he would not let him put it there? A. Yes.

(Testimony of Winfield Arlow Green.)

Q. Would it have been safer to use that third hole, as far as catching is concerned? A. Yes.

Mr. BRONSON.—I object to the question as calling for a conclusion of the witness.

The COURT.—Yes, I think so.

Mr. BASSETT.—He is a fisherman, and an expert.

The COURT.—Proceed.

Q. I will ask you whether or not the hooks were catching in the chain iron nearest the roller?

A. They were.

Q. How often would that happen?

A. Well, that happened any time that the ground-line went halfway, and the one that took my eye out was only a short ways—

The COURT.—(Interrupting.) How is that?

A. Any time the ground-line would go halfway up on this roller, the hooks were liable to catch, any time; of course, sometimes they would catch, and sometimes they did not. They were liable to catch them any time. [70—29]

Q. Did you complain of that condition to the captain? A. I did.

Q. Did other men there complain to him?

A. I could not say.

Q. But you did? A. I did.

Q. What did you tell him?

A. I had been at the side; and I says—

Q. You mean this iron?

A. Yes; and I had been across to that side, and I

(Testimony of Winfield Arlow Green.)

said to him, "I am afraid of that thing there"; and he emphasized it stronger than ever,—

Mr. BRONSON.—(Interrupting.) Just a minute. I move the last part of that answer be stricken.

The COURT.—What part?

Mr. BRONSON.—Stronger than that.

The COURT.—Oh, that is not proper.

Q. Go ahead and state what he said in answer to your complaint.

A. He said that was all right; and that all I had to do was to use both hands in clearance, which he meant to use force on the gangion.

Q. What do you mean by that?

A. By hauling hard on that as the winch does taking that in.

Q. He thought that would keep it from catching?

A. He thought I would get slack.

Mr. BRONSON.—(Interrupting.) I object to the witness testifying to what the captain thought.

The COURT.—That is argument.

Q. What did he say about it? [71—30]

A. And get slack so I would have time to get to the lever and stop it, so when the hooks caught in the line—

Mr. BRONSON.—(Interrupting.) That is argument.

Q. Did you tell him that should be covered with a zinc plate?

A. No, I did not tell him that.

Q. What did you say about it?

(Testimony of Winfield Arlow Green.)

A. Well, I did not tell him anything except I was afraid of it. In fact—can I make a statement now?

Q. You just answer the question, and I will ask you that. Was that all that was said about that iron?

A. That was all that was said at the time, yes.

Q. Was there just one complaint made, or were there others?

A. That is one complaint I made, because when they started fishing, we fished that day; and the next day we started fishing; at 2:00 o'clock in the afternoon I caught the hook and laid off.

Q. How long had you been fishing when this happened?

A. Well, my last trip—I don't just remember; but I think it was the second day; it might have been the third. I don't just remember that.

Q. Had you fished on other boats, Mr. Green, before you fished on this boat?

A. Yes; I have made my living largely for many years past that way.

Q. How are the sides of the boat usually protected against such things as this?

A. With iron plate— [72—31]

Mr. BRONSON.—(Interrupting.) Just a minute. I think this question is predicated upon a matter not appearing in the record.

Q. What is the customary way to cover the side from which you fish?

A. With an iron plate, a large iron or zinc plate covering the deck to keep the hooks from catching,

(Testimony of Winfield Arlow Green.)

something that the hooks won't dig into, because they have an enormous force when clearing.

Q. Just tell the Court what occurred when you were hurt. What were you doing, and what happened? A. I was clearing these gangions.

Q. What time of day was it?

A. About 2:30 o'clock in the afternoon of the 13th of May.

Q. 1927?

A. Yes. I was clearing these gangions, and I had one of these little thin caps on my head that engineers usually wear; and he had told me to force these gangions; I had not used both hands as he told me.

Q. Better explain what forced means.

A. That means to haul—I explained that before, —haul, put more force, and haul hard on the gangion, because the harder you pull the more momentum you give the hook; and I always like to obey orders as well as I could, so I tried it with one hand. They never had caught before until the line was halfway up on the roller; and this time it caught one-third up the roller.

Q. Why?

A. That was on account of the momentum I give the hooks by pressing them more. If I had slid them off gradual, [73—32] they would drop around the line, and would not fly up in the air; and another thing, I called his attention to, I felt he would keep the vessel headed on the—

(Testimony of Winfield Arlow Green.)

Mr. BRONSON.—(Interrupting.) I object to this recital as being very objectionable.

Q. How was the vessel headed at the time you were hauling on the line?

A. Well, I don't know just how.

Q. Was it forward or how?

A. I could not say.

Q. As to the gear?

Mr. BRONSON.—Now, just a minute. It is not necessary to lead him.

Mr. BASSETT.—I am not leading him.

The COURT.—How was the vessel headed?

A. They always follow along the gear, and they keep the vessel headed so as to keep the gear laid aft, and so, in this particular instance, it would have practically eliminated the danger.

The COURT.—How was it headed at the time you got hurt?

A. It was coming over the side; was working forward on the rope; one-third of the way ahead, when the hook caught on the rope.

Q. Then your line was not dragging behind, but it was coming up over the side?

A. No. It was not dragging behind. It was coming up over the side.

Q. Go ahead and tell the Court what happened. [74—33]

A. Well, this hook catches in this iron; you cannot see when it is caught; you do not know until the strain comes on it; you have very little slack or none at all; and you don't have much time. In this

(Testimony of Winfield Arlow Green.)

case it is possible that by jumping to the lever, going toward this thing that was going to hit me that I might have—

Mr. BRONSON. — (Interrupting.) Now, just a minute. I think that is very objectionable.

Q. You need not explain that. Counsel is getting worried.

Mr. BRONSON.—I take an exception to counsel's remarks also.

Q. What actually happened, tell us what happened, and not what you thought.

A. Well, this hook jumped back and hit me right here in the eyeball, and drove clear down, and lay over the lid, which you see it is; and I went to haul it out, and of course, the whole lid came out; and I had to get a hump on and I turned the hook and worked it down in the eye; and then the boys, I don't know who, because I was blinded, but they came, and they cut the gangion off as we call it where you start it off in the corner; and I went to haul the hook out of the eye, and the whole thing came out and I took my fingers, I was angry, and I yanked the hook out; and then I held the hook out and looked at it; because I thought lots of my eye, and then I threw it overboard. Then we went in the galley and I took care of the eye with hot water.

Q. What was the condition of the hook after you took it out of your eye?

A. The hook was sprung, I should judge, say at least a [75—34] quarter of an inch.

(Testimony of Winfield Arlow Green.)

Q. You mean it had straightened out?

A. Straightened out that much. It is tempered; pretty hard; especially the new ones, and it was sprung that much.

Q. Where were you treated for your injury first?

A. In Prince Rupert.

Q. Where else were you treated?

A. Well, here in Seattle when I came down here, and the stewards on the boat looked after my eye coming down; and then they took me to Port Townsend.

Q. Did the captain make any remarks about the accident immediately after it happened?

A. I did not hear him. The only time I had any talk with him was when I was trying to fix my eye; and he was trying to put me through the third degree, wanted to know if I could keep on fishing—

Mr. BRONSON. — Just a minute. I object to that.

Q. Never mind that. Which eye was injured? Was it your left eye that was injured?

A. Yes, my left eye.

Q. Can you see out of the left eye now?

A. Not to do me any good, no.

The COURT.—Can you see at all?

A. I can see the light; just a little bit of the eye left. It blurs this eye; when I want to see good I have to close this eye.

The COURT.—Does a glass help you any?

A. Well, a dark glass, which is required only some of the time. I really think I will have to take

(Testimony of Winfield Arlow Green.)

[76—35] it out. Dr. Cunningham wants to take it out of there right away; he said he did not think it should be left in there on account of affecting this other eye.

Q. You cannot distinguish people or things with that eye? A. No.

Q. You can just see shadows in bright light?

A. Yes.

Mr. BRONSON.—Just a minute; let the witness testify.

The COURT.—He previously stated that. He said he could see the light, but he could not see anything else. That answers the question.

Q. How old a man are you?

A. 51. I will be on the 26th of next month.

Q. You were 50 years old at the time of this accident? A. Yes.

The COURT.—Anybody can see that almost immediately.

Q. Who paid your medical bills?

Mr. BRONSON.—Just a minute; I object to that as immaterial.

Mr. BASSETT.—I think it is highly material.

Mr. BRONSON.—A seaman is entitled to be cured by the public health service; it is immaterial who pays for it.

The COURT.—I will let it go into the record.

A. Well, I guess that Uncle Sam pays for the bill.

The COURT.—How is that?

A. I think Uncle Sam paid the bill.

(Testimony of Winfield Arlow Green.)

Q. Have you ever paid anything for examinations or treatment? [77—36]

Mr. BRONSON.—I object to that as immaterial.

The COURT.—Let it go into the record.

A. Yes, I have paid out some money; but I don't know just how much.

The COURT.—Well, how much did you pay out?

A. About $8, I believe is about all I paid out as near as I can remember it now. It has been quite a while, and I did not keep track of the expenses.

Q. Did you receive any share or wages after you were injured for the rest of the voyage?

A. Approximately not, no; just for that day, I believe, is all; and not all of that. I believe they made $86, and I received $43.

Q. Now, was there any pain connected with that injury? Did you suffer any pain?

A. I suffered terribly at Port Townsend. They put me in the treatment room, and the windows were high, and it was in summer-time, and it was very painful.

Mr. BRONSON.—Where was this?

A. At Port Townsend.

Q. At the Marine Hospital? A. Yes.

Q. Was there any pain connected with the injury immediately after the accident?

A. Yes, it pained; hurt quite a bit.

Q. How long did that pain continue?

A. It was almost continuous.

Q. Until when?

A. Sometimes it was easier when the hot treat-

(Testimony of Winfield Arlow Green.)

ment relieved it. The hot treatment relieved the pain; it was almost [78—37] continual, however, for a long time.

Q. How long did you continue to suffer pain from it?

A. I don't remember just how long it was. I left the hospital down there, I believe it was the last of June or the 1st of July; and practically up to a week before that eye pained me considerably.

Q. Were you suffering pain for a period of three months, or more than that?

Mr. BRONSON.—Just a minute. I think that is calling for his conclusion.

The COURT.—Oh, yes, he has stated it.

Q. Well, he knows whether it has pained him three months or not.

The COURT.—Proceed.

Q. Approximately how long did you suffer pain from the eye?

Mr. BRONSON.—I object to that for the reason stated, that it is calling for the conclusion of the witness; and the witness has already stated that it did.

The COURT.—How long did it pain you?

Q. Until when, did you say?

A. Well, the severe pain, of course—my eye pains me yet at times; and I am bothered with it considerably. The pain? I don't know when it won't. Maybe not until I have the eye out. But the severe pain, the real pain which was all I could bear, that lasted—oh, let us see—I should judge about—well,

(Testimony of Winfield Arlow Green.)

it must have been about four or five weeks, anyway, at least.

Q. Have you ever had any trouble with your eyesight before the accident? [79—38]

A. No, sir, none at all. That is the only thing I ever had with it.

Q. How was the sight in the other eye?

A. The sight is fairly good with the other eye. The other eye almost feels like the other eye—I think that is the effect of the other eye on this here. I think I will have to have it taken out.

Q. Then you think the right eye has become affected as a result of this injury?

Mr. BRONSON.—Just a minute. That is his opinion.

The COURT.—He has stated it.

Q. Have you ever done any other kind of work besides being a common fisherman?

A. Oh, yes, I can work at lots of different work; and I have run machinery.

Q. Anything else?

A. I have run a vessel.

Q. When did you run a vessel?

A. In 1918, I had one of the—I run a 42-ton vessel for the San Juan Fishing Company.

Q. As the master of it?

A. As the master of it; yes.

Q. Has your injury now deprived you of seeking that kind of employment?

A. Well, not necessarily; but if I wanted a license, I cannot get it now. I could not even get

(Testimony of Winfield Arlow Green.)

my A. B. papers, in which I have to show that my eyesight is all right.

Q. How much did you earn at the time you were the master of a vessel? [80—39]

A. Some of it was percentage; but when I had a salary, I had $225 a month.

Q. Does that pay more than ordinary fishing?

A. That all depends upon what you have. I have made as high as four and five hundred dollars a month lots of times; and then not made anything from beginning to end.

The COURT.—That is fishing on lays?

A. Yes.

Q. Had you intended, before your injury, to get a license and take a regular position?

A. Yes; I always thought when I got up in years and I would not be able to do the heavy work, I would stop and then get a license as a master, because the position is a little easier.

Mr. BRONSON.—I move this last answer be stricken as speculative.

The COURT.—Objection sustained. Proceed.

Mr. BASSETT.—Exception.

Q. Does the condition of that eye incapacitate you from ordinary fishing? Does it annoy you fishing?

A. Yes, it annoys me.

Q. How?

A. It annoys me because I cannot see the same as I could before. It cuts off a part of my vision.

(Testimony of Winfield Arlow Green.)

The COURT.—Does that condition of your eye keep you from working?

A. Yes, your Honor. Some men might not in fishing; but it would incapacitate you on a merchant vessel, an [81—40] injury like this.

Q. It might prevent you from getting certain employment in certain lines? A. Yes.

Q. What kind of work have you been doing since the injury?

A. Oh, I have been seeking work as an engineer. I even went out and tried the regular game, but I had to leave, I could not make it.

Q. For how long a period, Mr. Green, if any, did your injury incapacitate you from performing any work at all?

A. I think I only worked in September, if I remember, in 1927; and I earned $13, I believe, before that. I forget just what time. Dr. Cunningham told me I could go to work, and I believe it was in July that he told me I could go to work; but I could not find anything to do.

The COURT.—The doctor said you could go to work in July?

A. I believe it was in July, the latter part of July. It was along in July, about the time that the "Aloha" was fixed up again, and I remember because I was out to see the captain, and I told him—

Mr. BRONSON.—I object to that.

Q. What kind of health were you enjoying at the time of your injury? A. I was in good health.

(Testimony of Winfield Arlow Green.)

Q. Was your health always good?

A. Well, it was not always good. I have been sick at times; but I was enjoying good health for the last, oh, I would say twelve or fifteen years. [82—41]

Q. Have you ever been in bed from any sickness in the last ten or fifteen years?

A. I don't remember that I have.

Q. Handing you Respondent's Exhibit "A–4," I will ask you whether or not that picture shows scratches and marks made by the hooks hauling in on the ship?

A. It certainly does. Anyone can see those on the paint there, and the iron. That sheet iron was taken off. That chain plate—

Mr. BRONSON.—Just a minute. That is not responsive to any question.

The COURT.—Objection sustained.

Q. These dark spots down below are caused by the hooks? A. Yes.

Q. Respondent's Exhibit "A–1" shows the same thing? A. Yes.

Q. Does that black area in the roller, was that caused by the hooks striking on there?

A. Yes, that was caused by the hooks striking on there.

Q. When were these photographs taken?

A. Sunday.

Q. Last Sunday? A. Yes.

The COURT.—Have they been offered in evidence as yet?

(Testimony of Winfield Arlow Green.)

Mr. BRONSON.—They have not been offered as yet.

The COURT.—I thought you had offered them. Proceed.

Q. Who took them? A. You did.

Q. These are all pictures of the "Aloha"? [83—42] A. Yes.

Mr. BASSETT.—We offer them in evidence.

Mr. BRONSON.—Which ones?

Mr. BASSETT.—All of them, all six.

Mr. BRONSON.—Pardon me until I see them.

Mr. BASSETT.—We also offer in evidence Respondent's Exhibit "A-7."

Mr. BRONSON.—Did you say that Exhibit "A-7" was for illustrative purposes. They do not purport to be the same line?

Mr. BASSETT.—No, not the same line; but I mean similar to the one being used at the time of the injury.

Mr. BRONSON.—It does not purport to be in the same condition?

Mr. BASSETT.—Oh, no, not as to its condition.

Mr. BRONSON.—We have no objection to it for illustrative purposes.

The COURT.—Exhibit 7 may be admitted.

(The object was then admitted in evidence and marked Respondent's Exhibit No. 7.)

Mr. BASSETT.—Also illustrates the size of the hook.

Mr. BRONSON.—We have no objection either of the Exhibits "A-1," "A-2," "A-3," "A-4," "A-

(Testimony of Winfield Arlow Green.)

5" and "A-6" for illustrative purposes; it being conceded that those were taken after the time in question.

Mr. BASSETT.—Yes.

Mr. BRONSON.—And not necessarily purports to show the condition actually obtaining at the time.

Mr. BASSETT.—No. Our testimony shows the [84—43] condition that existed, the marks on the zinc and iron as existing there.

The COURT.—They may be admitted.

(Photographs received in evidence and marked Respondent's Exhibits "A-1," "A-2," "A-3," "A-4," "A-5," and "A-6.")

Mr. BASSETT.—That is all. You may cross-examine.

Cross-examination.

(By Mr. BRONSON.)

Q. Do you hold a license of any kind?

A. No, I do not.

Q. Not even an engineer's license? A. No.

Q. Have you got an A. B. ticket? A. Yes.

Q. Have you ever had a master's license of any kind? A. No, sir.

Q. When you say that you have been the master of a vessel, what sort of a vessel are you talking about? A. A fishing vessel.

Q. A fishing boat? A. A fishing boat.

Q. Vessels that do not require a licensed master?

A. No, sir.

(Testimony of Winfield Arlow Green.)

Q. When you spoke of $225 a month, was that a wage that you got? A. That was a wage.

Q. Or was that share earnings? [85—44]

A. No; that was the salary during the war; it was only for a short time after I broke down with the engine; and I was running for the San Juan Fishing Company. I have a picture of the vessel yet.

Q. You testified at some length with reference to some conversation that you had with Captain Langnes about complaining to him about the hooks catching? A. Yes.

Q. Where was that? Where were you at the time? A. I was on the deck of the "Aloha."

Q. Who else was present besides Captain Langnes?

A. Why, I don't know whether—how many were present of the boys around on the deck, whether they noticed it or not, I don't know.

Q. You don't remember whether anybody else was present? A. No, sir.

Q. Do you remember where the vessel was, or what time it was approximately?

A. Well, I cannot remember exactly. We were on what you call dinner, when—anyway, it was before we went over to Cape St. James.

Q. Was it on the same trip?

A. Yes, it was on the same trip.

Q. You say the hooks caught many times on this chain plate? A. Yes.

Q. That was on the same trip, was it? A. Yes.

(Testimony of Winfield Arlow Green.)

Q. While you were tending to the ground-line?

A. Well, they caught while I was tending the ground-line; [86—45] and I suppose they did while the others were.

Q. All of the hooks—did the hooks ever catch any place else while you were tending ground-lines?

A. Yes.

Q. Where did they catch?

A. Once in a while they would catch on the back-stay, yes. However, that was not dangerous, because they always followed the lead; so that was not dangerous at all.

Q. Where else did they catch?

A. There was one day it dropped in the hole on top of the fore. That I never saw happen in all my experience. Just happened to drop down off the lead, straight across. But there was practically no danger from that.

Q. Did the hooks ever catch any place else while you were tending line?

A. No; the vessel was well protected excepting in one of these places. That was the most dangerous place where the men were standing tending the gangions.

Q. If you would just answer my questions, and not go on and volunteer remarks, we would get along faster. A. All right.

Q. In all of the time that you have been engaged in fishing you have been accustomed to hooks catching in various places about the ship while being pulled in?

(Testimony of Winfield Arlow Green.)

A. They catch in different places, yes.

Q. And that was your primary purpose, disengaging the hooks which catch, and also taking off the fish, as the gangions and ground-line come up over the roller; that is what you were there for? [87—46]

A. Well, I have to take the fish off; but I am not there to disengage hooks which catch; that is not part of the duties.

Q. You were the only man who was attending this line at the time? A. Yes, at the time.

Q. Where were you standing?

A. I was standing between the roller and the winch, taking it in.

Q. Where is that winch?

A. The winch is midship, right abreast the rope, straight in line with the way the roller was lined up then.

Q. That is directly abaft the wheel-house, or the engine-room? A. Yes.

Q. You were standing between the roller and this winch? A. Yes.

Q. How far away from the rail were you?

A. Well, I believe where I stood would be about a foot and a half or two feet; and as you clear the gangions, you walk back and forth to follow the line as it comes in.

Q. You say a foot or a foot and a half inside of the rail?

A. I believe so, as near as I can judge.

(Testimony of Winfield Arlow Green.)

Q. Where were you standing at the time the accident happened?

A. I was just over back against the table, like this, as far as I could get away from it.

Q. Where was the table that you speak of?

A. That table is right at the winch; in the picture I [88—47] should judge you can see the table laying there.

Q. Handing you Petitioner's Exhibit No. 2 for identification, is that a photograph of the location where you were standing? That is a portion of the deck adjacent to the roller where you were standing at the time, is it not? A. Yes.

Q. And this table you refer to is that shown in this photograph in the lower left-hand corner?

A. Yes.

Q. You say you were leaning against this table at the time the accident happened?

A. Yes; I backed up to this corner of the table; and there is also a jenny that goes across in here, and I was in the corner like that.

Q. That is the point then at which it occurred?

A. Well, I was right over here in this position (showing Court on photograph). I was standing right back in here, and tried to get out of the reach of that gangion, which was stretching and pulling.

Q. You were standing back here? A. Yes.

Q. Where were you standing when the hook first caught?

A. About up in here (indicating) walking back and forth between the winch and here, and I was

(Testimony of Winfield Arlow Green.)

clear out, I think I was standing about here; I seen it coming, and I stepped over here and hoped it would go by me, because I guessed, when they caught, that is the only place where they caught. [89—48]

Q. I just asked you where you were standing?

A. Well, I answered.

Q. We have not heard it yet.

Mr. BASSETT.—Just answer the question, and then stop, Mr. Green.

Q. This line was coming in from the water across the roller, and over toward the winch? A. Yes.

Q. Were there any other men standing adjacent to this line?

A. There was a man standing across on the other side.

Q. But between the winch and the water, you were the only one there? A. Yes.

The COURT.—How frequently did these hooks catch?

A. Well, I could not say that.

The COURT.—Often, or just occasionally?

A. Well, whenever the line was hauling in, occasionally, the hooks caught, as the line was coming in, whenever it did not turn on the roller; quite often.

Q. You were the only man who was standing between the winch and the water? A. Yes.

Q. And at the time you were out there handling the ground-line and the fish?

A. Yes; handling the line and the fish.

(Testimony of Winfield Arlow Green.)

Q. That is, you were tending the ground-line?

A. Yes.

Q. Was this winch power driven?

A. Yes; this winch was power driven. [90—49]

Q. Where is it controlled?

A. It is controlled by levers.

Q. Yes.

A. The lever we use is right here (indicating on photograph).

Q. That shows in that photograph; that is this lever (indicating)? A. Yes.

Q. Is there any other lever that controls it?

A. Yes, there were two other levers. There was one over here further that worked down against the forecastle-head.

Q. I just asked you where they were located?

A. On the girder, the one against the forecastle.

Q. So there were three different locations from where the winch was controlled? A. Yes.

Q. And these controls were used to stop and start it? A. Yes.

Q. Who was doing the starting and stopping of the winch as you tended the line? A. I was.

Q. Was that a part of your duty? A. Yes.

Q. You were supposed to control that?

A. Yes.

Q. You did not stop the winch on the occasion this hook caught?

A. No; I would not go towards it. I never did. [91—50]

(Testimony of Winfield Arlow Green.)

Q. Did you make an effort to stop it over here by the rail? A. No, I did not.

Q. Did you make an effort to stop it over here by the winch? A. No, sir.

Q. Did you ever make an effort to stop it over by the wheel-house?

A. I could not get over there. It was utterly impossible for me to get to that lever.

Q. In your experience on board this ship, Mr. Green, did you customarily allow hooks to be drawn out when they caught here and there on the vessel?

A. Yes, if they catch, I always let them tear out.

Q. Allow the power to pull them out?

A. Yes; that is right.

Q. Did you ever have any of the hooks catch in your clothing tending the ground-line?

A. Yes, I have had that happen.

Q. Have you ever had a hook catch on the deck tending ground-line? A. Yes, I have.

Q. Did you ever have two hooks catch together coming in on the ground-line? A. Yes, I have.

Q. As a matter of fact, these hooks habitually and customarily and perpetually catch in various places about the ship, and the fixtures, and rigging, and everything that a hook could possibly catch on or about the ship, don't [92—51] they, in the course of taking your catch in, don't they? A. No.

Q. They do not? A. No.

Q. How many years have you been fishing?

A. I have been fishing all my life, practically.

(Testimony of Winfield Arlow Green.)

I have been halibut fishing 20-odd years at least, off and on.

Q. How many times have you attended ground-line or seen men attending ground-line?

A. That would be impossible for me to answer.

Q. Well, many, many times over a period of years?

A. Yes.

Q. And during that time you have seen hooks catch many times in many places on the ship?

A. I have seen them catch several times.

Q. And it was your duty, was it not, when the hooks caught, any place about the ship, or in your clothing, or wherever they could catch, to stop your winch and clear them, was it not?

A. If I had time, which I done.

Q. That was your duty? A. If I had the time.

Q. That was a part of your duty?

A. Had I done it at this time—

Q. That was a part of your duty? A. Yes.

Q. And you understood it as such?

A. Yes; but you cannot say so absolutely.

Q. Now, you say these hooks caught several times in this [93—52] chain plate? A. Yes.

Q. Were you standing in the same position at the time you were hurt when they caught there?

A. Yes.

Q. That is, you were standing back a few feet from the rail?

A. Yes; working there, and walking back and forth.

Q. As a matter of fact, if you were standing even

(Testimony of Winfield Arlow Green.)

up against the rail, you can see the chain plate from the deck, can you; but if you are back a few feet from the rail you cannot see any part of the chain plate? A. No; only just the top part.

Q. So when you told the Court this caught on the chain plate on this particular occasion, you are assuming that it caught there?

A. That is the only place I know of that it could have caught on.

Q. You just assume it caught there because that is the only place you think it could have caught; is that correct? A. Well, yes.

The COURT.—He answered that question before.

Q. Showing you Respondent's Exhibit "A-1," you stated in response to counsel's questions, that these dark marks on the sheet iron were caused by the hooks? A. Yes.

Q. Was the sheet iron on the vessel at the time of this accident marked up in the same way there? [94—53]

A. I could not say as to that, I am sure. After they have been painted they always get that way after a while.

Q. You don't remember whether it was marked up that way, or similar to that, at the time?

A. No, sir, I do not.

Q. Then your testimony about that is all with reference to after the accident?

A. Well, I have some testimony I would like to give.

(Testimony of Winfield Arlow Green.)

Q. I will ask you the specific question: When you say these marks are caused from hooks, you mean these are marks caused since the accident?

A. That paint has been worn off since the accident, and I suppose they paint them up, and they would show those hook marks where they wear off the paint, from the momentum of the hooks hitting on the iron, they would knock the paint off all the time, for it shows on the paint marks; and when they have made a few trips, the paint is knocked off.

Q. Now, you stated that this roller was in the position shown in Exhibit "A–4," at the time of this accident? A. Yes.

Q. Do you pretend to remember distinctly whether it was or not? A. I do, yes.

Q. This roller can be placed in one or two positions on the rail, can it not? A. Yes.

Q. These holes in Exhibit "A–4" show where the holes were, [95—54] where they were placed at the time? A. Yes.

Q. It is simply set down in holes with the pins in the holes, is it not? A. Yes.

Q. Who placed that in the rail at the time?

A. Why, one of the boys fishing on the boat. I did not. They put it in there.

Q. You did not put that in there? A. No.

Q. And you are quite sure now it was next to the chain plate and backstays and not further aft?

A. Yes.

Q. In all of the vessels you have been on in your experience in fishing, what distance is the roller

(Testimony of Winfield Arlow Green.)

placed away from the backstay or the chain plate as an average, would you say?

A. Why, there is quite a few of them have them close to the chain plate.

Q. Quite close, don't they? A. Yes.

Q. You would say that is not an unusual position for them to be in? A. No.

Q. They vary, don't they? A. Yes.

Q. According to the general variation in hull construction? A. Yes.

Q. And you have had experience with them in this position, [96—55] have you not? A. Yes.

Q. In those vessels you have been on, have you ever been on vessels which did not have the chain plates covered with sheet iron?

A. Well, I don't think I ever have, except when I went on the next one I shipped on after I was on this, I covered it.

Q. Did you say you covered it? A. Yes.

Q. But you have seen lots of vessels that did not have the chain plate covered, that you have been on?

A. Well, I would not say, because I never took particular notice unless I am working on the particular vessel; I don't go around looking at chain plates or see how they are fastened.

Q. You never have paid any particular attention to that? A. No, I have not.

Q. When this hook snapped back and caught your eye as you have related to the Court, it went down

(Testimony of Winfield Arlow Green.)

through your eye, were you able to get that hook out yourself, or were you assisted in doing it?

A. Well, I hauled it out myself. They cut, somebody cut, I don't know who, one of the boys, cut the chain which was on it, and I hauled the hook out myself; I pulled it out of my eye myself.

Q. Was your eye bleeding at the time?

A. Yes.

Q. Were you able to see out of it at all? [97—56] A. No.

Q. What did you do immediately after that?

A. Immediately after I took the hook out?

Q. Yes.

A. Well, I stood like this, and gritted my teeth, and looked at the hook, and then threw it as far as I could send it; and I done that because I was angry over my eye being gone.

Q. You could see that hook?

A. Yes, I could see it with my right eye; but not with this one. (Indicating.)

Q. And you stopped, after this accident, to examine that hook? A. I did, yes.

Q. And then you threw it away? A. Yes.

Q. Threw it over the side of the ship? A. Yes.

Q. You realized, did you not, that there is danger of hooks catching around on these vessels you work on from time to time?

The COURT.—Oh, yes, certainly. Every man realizes that.

Mr. BRONSON.—I simply want to show his knowledge.

(Testimony of Winfield Arlow Green.)

A. To a certain amount, yes.

Q. And you appreciated there was that danger when you signed on that vessel?

A. No, not so much danger, because it was the most vicious thing I ever got up against while I was fishing. [98—57]

Mr. BRONSON.—I think that is all.

Redirect Examination.

(By Mr. BASSETT.)

Q. Mr. Green, after the accident, did you examine the backstay iron nearest the roller? A. I did.

Q. What was the condition of that iron?

A. It was cut all up with hooks, dug right into it.

Q. You say you have been on boats before, and that a good many boats have the rollers next to the stay arm? A. Yes.

Q. Is it customary to leave the stay arm uncovered, or is it customary to cover that with some smooth metal?

Mr. BRONSON.—Just a minute. The witness said he had no knowledge to answer that question. He said he had not observed whether they were covered or not.

A. In several vessels I was on I never took any particular notice, no.

The COURT.—He said that before. I thought he was very fair.

Q. Where did you start to fish on this trip?

A. Why, I think it was what we call Goose Island; I could not tell for sure.

Q. Where is that? A. Hackett Straits.

(Testimony of Winfield Arlow Green.)

Q. You did not start fishing until you got there?

A. I don't just remember now. But I don't think we did.

Q. Of course, you did not know these hooks were going to [99—58] catch in these irons until you started fishing, did you? A. No, I did not.

Q. Now, counsel asked you if it was not possible to stop the winch by turning it—turning on one or two or three levers? Why didn't you reach forward and throw out the lever that was along the rail, along the roller?

A. Because I considered it to be more dangerous, and I did not have time, and I did not look for the gangion to stretch, but I never go toward them. I never did.

Q. Why didn't you go forward?

A. If the gangion is going to hit me, I am not going forward.

Q. It is more dangerous to go forward toward the hook? A. I considered it so.

Q. How long did it take for this thing to happen, from the time it caught until it snapped back and hit your eye?

A. I could not estimate the time of that; it is impossible.

Q. Was it quick? A. Yes.

Q. Did you attempt to reach it?

A. Yes; but before the gangion stretched, it stretched from four to six inches before it let go. Sometimes they let go quick. This one that caught me stretched that gangion from four to six inches,

(Testimony of Winfield Arlow Green.)

so I would not have time, if I had jumped; but I did not know what time it was coming back.

Q. If the roller is inserted in the two holes further away from the chain irons, is the danger less or greater? [100—59] A. It is less.

Mr. BRONSON.—That is objected to as argument.

The COURT.—Yes.

Mr. BRONSON.—I move to strike the answer.

The COURT.—Stricken.

Q. You testified you never had a license yourself? A. No.

Q. You never have acted as a licensed pilot?

A. No, sir.

Q. What is the wage or salary that a licensed pilot receives? A. I don't know about that.

Q. You cannot testify about that? A. No.

Q. Who treated you here in the city of Seattle?

A. Dr. Cunningham.

Mr. BRONSON.—That is not redirect examination.

Mr. BASSETT.—That is all.

Recross-examination.

(By Mr. BRONSON.)

Q. May I inquire one further question of this witness. Could you tell the Court some of the vessels you were on prior to this accident?

A. Yes, I was on the "Mildred."

Q. What other vessels were you on?

(Testimony of Winfield Arlow Green.)

A. And I have been on the "Arrow," the "Aranac," the "Gretchen," and the "Moody."

Q. How do you spell that last? [101—60]

A. M-o-l-d-e, I believe it is. She is made over now. She is the "Gretchen." I run her where I handled the roller and levers and everything.

Q. What other vessels were you ever on?

A. I was on the "Spray."

Q. Could you give us any others readily?

A. On the "Little Enterprise."

Mr. BRONSON.—That is all.

Redirect Examination.

(By Mr. BASSETT.)

Q. How many more were you on that you cannot remember?

A. Oh, well, I have been following the business so many years I can't remember. I don't see what difference it makes anyway.

The COURT.—Call the next witness.

Mr. BRONSON.—I would like to offer in evidence Petitioner's Exhibit 2 as part of the cross-examination.

Mr. BASSETT.—No objection.

The COURT.—Admitted.

(Document received in evidence and marked Petitioner's Exhibit 2.)

(Witness excused.) [102—61]

TESTIMONY OF JACOB PETERSON, FOR CLAIMANT AND RESPONDENT.

JACOB PETERSON, called as a witness on behalf of the claimant and respondent, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. State your name. A. Jacob Peterson.

Q. What is your business or occupation?

A. Fisherman.

Q. Were you a fisherman on board the "Aloha" owned by Captain Langnes? A. Yes.

The COURT.—In 1927?

Q. Yes, in 1927?

A. No, I was on in 1926.

Q. Were you on board that vessel when Mr. Green was injured? A. No, sir.

Q. You were not on board the vessel then?

A. No, sir.

Q. Did I ever talk to you about this case at all? Have you ever seen me?

A. I don't remember it.

Q. You have been away fishing, have you?

A. Yes, recently.

The COURT.—Call the next witness.

Q. You have fished on the "Aloha" have you not?

A. Yes, I have.

The COURT.—In 1926. [103—62]

Mr. BASSETT.—Yes, 1926.

(Testimony of Jacob Peterson.)

Q. Do you remember the condition of the side of the "Aloha" on the side from which you fished in 1926, with reference to whether or not it was covered with zinc metal?

A. Yes, it was covered with zinc, metal.

Q. Handing you Respondent's Exhibit "A," I will ask you whether or not the metal at that time covered the chain irons nearest the roller; do you remember it?

A. No, sir, they did not cover it.

Q. What is the metal used for?

A. It is merely used to protect the hooks from catching.

Q. Used to keep the hooks from catching?

A. Yes.

Q. Handing you Respondent's Exhibit No. 4, I will ask you whether the metal covered the nearest backstay iron?

Mr. BRONSON.—The pictures speak for themselves, your Honor.

A. They do cover the backstay there; but I don't remember it.

Q. It was not there at the time you were on?

A. No, sir.

Q. It did not cover that arm?

A. If it covered it now, it did not cover it then.

The COURT.—It was not covered when you fished on it, but it is covered now?

A. Yes, it was covered when I fished on it.

Q. Did you have any trouble with hooks catching on the [104—63] iron while you were on board?

(Testimony of Jacob Peterson.)

A. They catch on all the boats.

The COURT.—There is no use in asking him that.

Mr. BASSETT.—That is all.

Cross-examination.

(By Mr. BRONSON.)

Q. I understand you to say the iron was over the after chain plate at the time you were on it?

A. Yes, it was over the aft chain plate; it was in the same condition as it is now, as far as I know.

Mr. BASSETT.—You don't remember, then?

A. No, I do not.

Mr. BASSETT.—We do not want you to testify if you do not remember.

(Witness excused.)

(And thereupon the further trial of said cause was continued to 2:00 o'clock P. M., January 22, 1929.) [105—64]

January 22, 1929, 2:00 o'clock P. M.

Trial resumed. Counsel and all parties present.

TESTIMONY OF DR. W. F. CUNNINGHAM, FOR RESPONDENT AND CLAIMANT.

Dr. W. F. CUNNINGHAM, called as a witness on behalf of respondent and claimant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. Your name is W. F. Cunningham? A. Yes.

(Testimony of Dr. W. F. Cunningham.)

Q. Are you a practicing physician and surgeon in this vicinity? A. Yes.

Q. How long have you been practicing in Seattle?

A. About 25 years.

Q. From what medical college are you a graduate? A. Toronto University.

Q. Do you specialize in any field of medical science? A. Yes, eye, ear, nose and throat.

Q. Did you ever examine the plaintiff Winfield Green sitting here? A. Yes.

Q. When did you first see Mr. Green?

A. I saw him in May last, 1928.

Q. What did he come to you about then, Dr. Cunningham? [106—65]

A. He came to me to have me treat his eye because of his injury that he had received up in Alaska. I did this work for the United States Public Health Service; that is how I happened to see him.

Q. He was sent to you by the United States Public Health Service? A. Yes.

Q. What was the condition of the eye when you saw it in May, 1928?

A. That is the left eye? Yes.

Q. Have you a memorandum there from which you can refresh your memory?

A. Just a minute. I have not got my clinical card; but I have the date I saw him first, and the subsequent times he came to my office. May 13th, 1927.

Q. That is when this happened? A. Yes.

(Testimony of Dr. W. F. Cunningham.)

Q. When did you see him?

A. I saw him on May 23d of the same year.

Q. What was the condition of the eye then?

A. The eye was quite inflamed; but I felt there was very little to do, just wait and let the inflammation subside, which it did. I saw him—I did not see him May 23d. It was July 2d he came in, and then subsequently on the 2d, 5th, 9th and 15th.

Q. Did you treat him in any way?

A. Yes; he used sedative medicine, drops of atrophine—well, I just have forgotten the details of that now.

Q. You recall the condition of the eye with respect to [107—66] sight, do you not? A. Yes.

Q. Well, you recall the condition of the eye with respect to sight, do you not?

A. Yes, I have a record of that here.

Q. What is the condition of the eye as to sight during these times?

A. The sight was almost gone in that eye.

Q. When was that?

A. Well, that was from the time I first saw him.

Q. When did you examine him last?

A. October 31, 1928. No, on the 27th. That is the 27th. I have got that year wrong. This all happened in 1927. My examination. This year was 1928.

Q. The last visit was October 31, 1928?

A. I got the other date 1927, and the last visit was October 31, 1928.

(Testimony of Dr. W. F. Cunningham.)

Q. Did you examine his eye to determine how much he could see out of it?

A. I counted his focus at 2 feet in a good light.

Q. Is that vision of any practical use, Doctor?

A. No.

Q. Is that vision gone; or is it not, for any practical use? A. Yes, I would say so.

Q. Is that condition permanent? A. It is.

Q. How much pain and suffering is connected with an injury of that kind? [108—67]

Mr. BRONSON.—I think that is rather speculative.

The COURT.—Objection sustained.

Q. Is there any pain and suffering connected with an injury of that kind?

Mr. BRONSON.—The same objection. The witness cannot testify to that. This is the doctor.

Mr. BASSETT.—Do you mean to say a competent specialist on the stand—

The COURT. — (Interrupting.) Oh, anyone knows it is painful to have an eye hurt. He has testified himself that it was painful.

Mr. BASSETT.—Very well, that is all, Dr. Cunningham, thank you.

Mr. BRONSON.—No cross-examination.

(Witness excused.) [109—68]

TESTIMONY OF ED BRALEN, FOR CLAIMANT AND RESPONDENT.

ED BRALEN, called as a witness on behalf of claimant and respondent, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. What is your full name? A. Ed Bralen.

Q. What is your business or occupation?

A. Oh, fishing.

Q. How long have you been fishing?

A. Oh, I started halibut fishing in 1904.

Q. Were you ever on board the boat "Aloha" under Captain Langnes in 1927? A. Yes.

Q. In May, 1927? A. Yes.

Q. Were you working on board that vessel when Mr. Green was injured? A. Yes.

Q. Were you present when the accident happened? A. I were.

Q. Were you present when the accident happened? A. I was standing baiting gear.

Q. Did you see the hook fly up over the side of the rail and strike Green in the eye?

A. No; my back was simply turned to him.

The COURT.—He said he did not see it. Ask him the next question.

Q. Did you see the hook taken out of his eye? [110—69] A. Yes.

Q. You were there when that was done?

(Testimony of Ed Bralen.)

A. Yes.

Q. Did you notice the condition of the hook?

A. Well, I think—

Q. (Interrupting.) I asked you if you noticed the condition of the hook?

A. Why, I think the hook was straightened a little bit. That is what I think. It looked that way to me.

Q. Handing you Respondent's Exhibit "A-1," do you recognize that as the side of the vessel from which you were fishing on that voyage? Does that substantially show the way the roller looks when it is fastened to the railing? A. Yes.

Q. Now, just forward of the rail, where the roller is put on the rail, there are three chain irons around there. There is one close to the rolier and two others more forward? A. Yes.

Q. At the time of the accident was there any zinc covering the rollers?

A. No; the zinc went up to the rollers and close to it.

Q. But it did not cover it? A. No.

Q. Do you know whether hooks were catching in that iron?

A. Well, there was hooks catching on and off from the vessel, hooks.

Q. Did you examine that iron after the accident to see the [111—70] condition it was in?

A. No, I did not.

Q. Did you notice whether it had been struck by hooks?

(Testimony of Ed Bralen.)

A. Well, it was in places, yes; you catch hooks in most of the fishing ships, hooks catch in that iron and make a dent in it, or mark in it.

Q. You can't tell whether it was from the hooks?

A. No.

Q. But there were such marks on it? A. Yes.

Q. Were you present when Mr. Green complained about the iron not being covered?

A. No; I never heard that.

Q. I will ask you whether in your opinion the condition of the side of the vessel would have been safer if that iron had been covered with zinc than it was without the zinc covering?

Mr. BRONSON.—Objected to as incompetent, irrelevant and immaterial; and calling for the conclusion of the witness.

The COURT.—Objection sustained.

Q. I will ask you whether or not that iron near the roller was covered after the accident?

A. That iron was covered after the accident.

Q. Yes. A. Yes.

Q. When was that?

A. Well, it was when the boat was laid up for repairs.

Q. What port was that done in? [112—71]

A. I believe it was done in Lake Union.

Q. That was as soon as you got back?

A. It must have been done two or three trips after that.

Q. I will ask you whether the condition of the

(Testimony of Ed Bralen.)

boat, as shown by the picture, is safer now than it was at the time of the accident?

Mr. BRONSON.—Objected to as incompetent, irrelevant and immaterial and calling for his conclusion.

The COURT.—Objection sustained.

Q. By the way, I never talked to you about this case before to-day, did I?

A. No, this is the first time.

Q. Have you talked with counsel for Mr. Langnes before? Have you ever talked with Mr. Bronson before about the case?

A. I have been to his office once, I believe, it was a year ago.

Q. You were in his office once a year ago?

A. Yes.

Mr. BASSETT.—That is all.

Cross-examination.

(By Mr. BRONSON.)

Q. You talked to me about the case at that time, when you were in my office that one time?

A. Yes.

Q. Have you ever tended line when you have been on these fishing vessels since 1904?

A. Have I been tending lines? [113—72]

Q. Yes, tending ground-lines?

A. Yes, sure.

Q. Have you done that very much in the years you have been fishing? A. Oh, yes.

Q. In your experience tending ground-lines, did

(Testimony of Ed Bralen.)

the hooks, as they were brought in over the roller, frequently catch on various parts of the vessel?

A. No, they don't really catch. Of course, it is a matter of how you clear it; how you clear the hooks off the ground-line, clear the gangions off the ground-line when they twist up; and it is a matter of how fast it is going; and if you pull them out real often, it will take a big swing, a quick swing. If you take it easier, of course, they act slower.

Q. It depends a great deal upon the man tending the ground-lines, whether the hooks catch or not?

A. Yes, it does.

Q. In your experience, have you ever had hooks catch on parts of the vessels you have been on?

A. Oh, yes, I have had hooks catching in different places; but it has not hurt me any.

Q. Do you know what the proper thing to do is when the hooks catch in tending ground-line?

A. No, I do not.

Q. Do you know whether it is proper for a man to allow it to tear the hook loose with the winch, or do they stop the winch and disconnect the hook?

A. Absolutely stop it. [114—73]

Q. Is that what you are accustomed to do in your experience of handling ground-lines? A. Yes.

Q. And not allow the hooks to be torn out?

A. I believe, if the hook is fast, the gangion is fast, I grab for the lever to stop the winch.

Q. In tending ground-line, do you know whether it is customary to use one or both hands to clear these gangions?

(Testimony of Ed Bralen.)

A. I believe it is safer to use both hands.

Q. Did you ever receive any instructions from Captain Langnes—

Mr. BASSETT.—I move to strike that last answer as not responsive to the question.

(Record read at the direction of the Court.)

The COURT.—Objection sustained.

Q. Can you answer whether or not it is customary?

A. I believe it is customary to use both hands.

Q. Were you ever present when Captain Langnes gave any instructions to Mr. Green, or gave any instructions to a group of men, among whom was Green? A. He gave—

Q. Just say yes or no whether you were present?

A. Yes.

Q. Do you recall whether the master ever gave any instructions to you or Green when Mr. Green was present as to how to handle the ground-lines with reference to clearing the hooks?

A. Captain Langnes told us many many times to be careful all of us when we were doing it, and what we ought to [115—74] do, the way to do it.

Q. Was Green there at the time?

A. Oh, yes; we were all there.

Q. What did he say about clearing the gangions?

A. Whether he said anything?

Q. Yes, whether he said anything, or anybody made any objection to it?

A. Oh, yes, frequently he advised us; he told us to be careful.

(Testimony of Ed Bralen.)

Q. Was that before this accident?

A. Before this accident; yes.

Q. Were any orders given to you by the captain, or to Mr. Green, with reference to using one or two hands?

A. Why, he told me anyway to use both hands. Whether he told Green or not, I would not say for sure; but he told me.

Mr. BASSETT.—I move to strike the answer as not responsive to the question.

The COURT.—Is that all?

Mr. BRONSON.—Did your Honor rule on the objection?

Mr. BASSETT.—I move to strike the answer as not being responsive.

The COURT.—Overruled.

Q. You stated you examined this hook after it was taken from Green's eye?

A. I seen the hook just as it was taken out.

Q. And you said, to the best of your recollection, I believe, that you thought it was straightened a little? A. I believe it was. [116—75]

Q. Are you really sure about that?

A. Well, I am pretty sure.

Q. When you say straightened, what do you mean?

A. A hook may be straightened just a little bit more than ordinary when it is brand new; and I might say it is. It might have been straight before that; but we did not use—I don't know whether

(Testimony of Ed Bralen.)

that hook was stretched out or not. I did not see it.

Q. Did you notice the point of the hook?

A. Well, I think the point was just ordinary.

Q. The point of the hook was just ordinary. You mean the pointed head of the barb, was that bent or damaged in any way?

A. No, I could not say that.

Q. You mean then that the shank of the hook was bent out slightly?

A. I mean straightened a little bit here, you know.

Q. In the bend?

A. Yes, in the bend here.

Q. That was the normal condition?

A. Yes, that is the normal condition of the point.

Q. In your experience on these vessels since 1904, how many vessels have you been on which have had the chain plates covered with sheet iron?

A. Well, I have not paid any attention to any that had been covered.

Q. Do you remember of ever being on one which was covered with sheet iron?

A. No, sir, not except this one here; that "Aloha" and that [117—76] was afterwards covered.

Q. That was afterwards covered? A. Yes.

Q. That is the only one you remember of?

A. That is the only one I remember of.

Q. In your experience in handling these lines on board these vessels you say the hooks frequently

(Testimony of Ed Bralen.)

catch in various parts of the ship, and you have stopped the winch and disengaged them?

A. Yes.

Q. Counsel asked you about marks on the sheet iron, and I believe you said occasionally where there were dents in the sheet iron, the hooks would catch there? A. Yes.

Q. You mean that the hook will catch on the surface of the sheet iron itself?

A. I mean on the surface itself; the sheet iron is nailed on with nails, and where it is hammered, there is dents in it, and it will catch there.

Q. So hooks will catch even on sheet iron.

A. Yes, that is if there is a dent or any scratches on it.

Q. Do you remember where this roller was at the time of the accident?

A. No, I could not say.

Q. You don't remember where it was located on the rail?

A. No. Of course, when we were hauling in deep water, we had it in the forward hole, so you can bend it, when you haul in deep water; when we haul in shallow water it was in the after hole; that is the way we use it. [118—77]

Q. Did you operate this ground-line after Green was hurt? A. Yes.

Q. Did you have any trouble with hooks catching on the chain plate?

A. No; just once in a while; it was a matter of which way the gear was leading. If the gear was

(Testimony of Ed Bralen.)

leading underneath the boat it was more liable to catch, and did catch.

Q. Catch where?

A. On the side of the vessel. When the gear was running up over the side of the vessel. When it was set out from the side, it was not so liable to catch.

Q. You had no difficulty in tending the groundline after Green was hurt? A. I had no trouble.

Q. You used both hands in disengaging the lines?

A. Most of the times; and sometimes I might use one, of course, but most of the time, for safety, I used two.

Q. Did you have occasion to operate the winch from the lever at the rail?

A. I used the lever a great deal.

Q. And that stops and starts the winch, does it?

A. Yes.

Mr. BRONSON.—That is all.

Redirect Examination.

(By Mr. BASSETT.)

Q. You say when the hook catches, you reach forward, do you, and pull the lever? [119—78]

A. I don't reach forward. The lever is right by my foot, on the side of my leg.

Q. Well, is it not safer to get out of the way than to stand there and shut off the lever?

A. No, it is not safer to get away.

Q. You stand there and shut off the machine?

A. Yes.

(Testimony of Ed Bralen.)

The COURT.—With your foot or hand?

A. With my hand. There is a lever sticking up above the rail about that much (indicating).

Q. That is near the rail?

A. Well, standing right close to the rail.

Q. There is a roller there? Where is the railing with respect to it? Next to it?

A. The lever stands right up there (indicating).

Q. Then when a hook catches, you take the trouble to manipulate the lever instead of getting out of the way of the hook? A. Naturally.

Q. Does everybody do that, do you know?

A. Well, I could not say as to that. Everybody does that if a person is playing safe.

Q. Have you been working for Langnes since this accident happened?

A. Yes, I worked until about three months after the accident.

Q. Did you work the following season for him?

A. I did not work the whole season.

Q. Did you work part of the season? [120—79] A. Part of the season.

Q. You expect to go to work for him again, do you?

A. Why, I don't see why I should not. I have got to work for somebody.

Q. Now, you say if there are dents in the zinc where they are nailed, the hooks will catch in the dents? A. Yes.

Q. How long are these gangions?

(Testimony of Ed Bralen.)

A. Them gangions are supposed to be 52 inches long.

Q. So if you have a piece of zinc there 150 inches wide, would they still catch in the dents where it is nailed in the ship, would the hooks still catch?

A. Why, if you have it 150 inches wide, and you have it nailed, they will catch.

Q. If the zinc is wider than the gangions are long?

A. Why, yes, as long as it is nailed on—

Q. Oh, if it is nailed—

Mr. BRONSON.—(Interrupting.) Let the witness finish his answer to the question.

A. It is nailed in the center. It is nailed in rotation all over the sheet iron to hold it in to the ship's side.

Q. Nailed along the edges, is it?

A. Yes, on the edges; and then maybe there is a row of nails a foot apart.

Q. Is it safer with or without zinc?

A. Safer with zinc.

Mr. BASSETT.—That is all. [121—80]

Recross-examination.

(By Mr. BRONSON.)

Q. Who stopped the winch when the gangion caught, Mr. Green?

A. Captain Langnes stopped the winch.

Q. He came aft and stopped the winch himself?

A. Yes. When this accident happened, Mr. Green—

(Testimony of Severine Holmess.)

The COURT.—He has answered the question.

Mr. BRONSON.—Yes. That is all.

(Witness excused.)

TESTIMONY OF SEVERINE HOLMESS, FOR CLAIMANT AND RESPONDENT.

SEVERINE HOLMESS, a witness called on behalf of claimant and respondent, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. State your full name.

A. Severine Holmess.

Q. Now, Mr. Holmess, you were a fisherman on board the "Aloha" when Mr. Green was injured?

A. Yes.

Q. You have already talked to Mr. Bronson here about the case?

A. Yes, he had me up to his office about a year and a half ago.

Q. This is the first time I have ever talked with you? [122—81]

The COURT.—Proceed. That don't make any difference.

Q. Did you actually see the accident when it happened?

A. Well, I seen him when he came from the rail; he had the hook in his eye.

Q. That is when you saw him, when he yelled?

(Testimony of Severine Holmess.)

A. Yes.

Q. That is the first you saw him? A. Yes.

Q. You saw the hook taken from his eye?

A. I cut it out of the gangion.

Q. Did you look at the hook?

A. Well, he held it in his hand after he took it out himself.

Q. Did you notice whether it was straightened out, if any?

A. I could not say for sure; I don't remember.

Q. What is your best recollection?

A. Well, it was a shiny hook; a new hook. I saw that when I cut it off the gangion.

Q. You do not recall whether it was straightened out or not at all? A. No.

Q. You have also handled ground-line have you?

A. Yes.

Q. Were the hooks catching much when you were handling it?

A. Well, I have had them catch once in a while when I did it.

Q. Were any complaints made to Langnes about it? A. No.

Q. Did you hear Mr. Green make any complaint? [123—82]

A. Never heard him make any complaint. He said he was scared of it.

Q. Telling it to Langnes, was he?

A. I could not say whether he told Langnes. I know he was talking about it.

Q. Langnes was there? A. Oh, yes.

(Testimony of Severine Holmess.)

Q. Didn't he point to the iron and say the hook caught on it? A. No, he did not.

Q. Was that on the iron where it was catching?

A. Yes.

Q. Is it safer to have that covered with zinc?

Mr. BRONSON.—Objected to as calling for his conclusion?

The COURT.—Objection sustained.

Q. Have you ever seen boats with the sides covered with zinc to protect it from the hook catching?

A. Some have and some have not. Of course, they have all got sheet iron on there; and some of them have iron guards on it.

Q. This iron guard is tougher? A. Yes.

Q. But the "Loha" at the time of the injury, did not have any sheet iron over the first iron?

A. No, it did not.

Q. What was done about that after the accident?

Mr. BRONSON.—Objected to as immaterial; that has been gone over a number of times. [124—83]

The COURT.—Objection sustained.

Q. How do you handle the lines when you are receiving them? Do you force them, or pull them out with both hands, or simply draw them in?

A. Do you mean standing at the roller?

Q. Yes.

A. You are taking care of the gangions. The winch takes care of the line.

Q. The winch pulls in the line? A. Yes.

(Testimony of Severine Holmess.)

Q. You do not have to stand there and pull it in with both hands? A. No.

Q. Is it not safer to haul on the lines than to force them?

A. Well, them gangions, that is the short line with the hook. That is what I mean. Take that, and get the slack, and take the hook in. If it should catch. If you do not take in the slack, on the hook inside of the roller, then you have no chance to stop. It might jump it out.

Q. If it should catch, or suddenly catch?

A. Yes.

Q. Would it be any safer to run up closer to the rail and pull that lever than to get out of the way?

A. No; you stand right there. That is where you stand when you are working.

Q. You do not think it would be safer to run back and get out of the way?

A. No; you stand there, and get hold of the lever, and stop it; and then it is safe. [125—84]

Q. That depends upon how soon you discover the hook was caught? A. Yes.

Q. Would that be true in all cases, to stand there and pull on the lever, instead of getting out of the way? A. That is what I would do.

Q. You would not try to get out of the way?

A. No.

Q. Do you remember when the zinc was extended over and beyond the nearest chain iron?

A. When it was extended? Yes. We made two

(Testimony of Severine Holmess.)

or three trips afterwards, when he had the boat repaired, and painted up.

Q. That was how long afterward? About a month after that? A. That must have been in July.

Q. Did you ever notice the condition of the first chain iron before it was covered with zinc, and after the accident? A. No, sir, I did not.

Cross-examination.

(By Mr. BRONSON.)

Q. Did you ever hear the captain make—give any instructions to Mr. Green, or to the other men in Mr. Green's presence, with reference to the use of one or two hands in the handling of the ground-line?

A. He told us, all of us, to be careful.

Q. What did he tell you to do?

A. To use both hands when taking the slack in off the gangions. [126—85]

Q. You mean taking the slack in on the little line?

A. The little line, where the hook is.

Q. What is the purpose of taking in the slack on the little line?

A. Just to get them untangled, clear them.

Q. If they should catch, what were you supposed to do? A. You are supposed to stop the gear.

Q. That is the duty of the man at the roller to do that? A. Yes.

Q. You have had experience in tending ground-lines? A. Yes.

Q. Did you tend the ground-line either before or after Mr. Green was hurt? A. Yes.

(Testimony of Severine Holmess.)

Q. Did you have any difficulty in clearing the hook, or stopping the winch, if the hooks caught anywhere? A. No.

Q. Counsel has asked you whether the "Aloha" had an iron guard or sheet iron. You kept referring to zinc. Did the "Aloha" at the time of the accident, have an iron guard below, and also a guard, a sheet-iron strip above the lower guard?

A. Well, that I cannot say. I am not positive about how far down that went.

Q. You do not recall that? A. No.

Q. Do you remember she had any sheet iron on at all? A. Yes, sir, she had.

Q. Where was the sheet iron? [127—86]

A. I don't know where it went behind; but it was about a foot and a half in front of the roller.

Q. How far behind the roller?

A. I would not say for sure; but it was two or three feet behind the roller.

Q. She had that on at the time of the accident?

A. I am not sure about how far, to be sure of it.

Q. Do you remember whether she had sheet iron on at the time of the accident? A. Yes, she had.

Q. Do you remember whether she had an iron guard below?

A. No, that I cannot recall, unless she had it on the front.

Q. In your experience, in tending ground-lines, was it a frequent occurrence, or an occasional occurrence that hooks would catch about the vessel in various places?

(Testimony of Severine Holmess.)

Q. Oh, yes. They can catch mostly on anything. You might miss a fish; take fish 50 or 60 pounds, and you sometimes may have a fish, and you miss it. You get to the roller, and then the chance you have to catch the hook; why, the hook might go into the heset iron, or any place.

Q. Do these hooks on these gangions ever catch on anything when you are tending ground-line, and when it is being pulled in by the winch?

A. Yes. You drop them on deck; and you can see where the deck is all chewed up; they will catch any place where it is rough wood, they will catch.

Q. Have you ever seen them catch on sheet iron? [128—87]

A. Not except there was a hole or a dent from a nail.

Q. They will catch then, will they? A. Yes.

Q. You will say then that was a common occurrence, would you, in tending line that they have a tendency to catch?

Mr. BASSETT.—Objected to as leading.

The COURT.—How often did that occur? How often did the hooks catch?

A. Oh, they may catch many times a day on the sheet iron.

Q. Is that true of all vessels you have been on?

A. Well, I ain't been no place where—I ain't been on any vessels where they don't catch some place on the vessels.

Q. When did you start fishing?

A. I started in '14.

(Testimony of Severine Holmess.)

Mr. BRONSON.—I think that is all.

Redirect Examination.

(By Mr. BASSETT.)

Q. But it is less likely for the hook to catch if the side of the vessel is covered with some kind of metal?

Mr. BRONSON.—I think that is argument, your Honor.

Q. That is true, is it not?

A. Well, we try and prevent it if we possibly can.

Q. It is less likely to happen if the side of the vessel is covered with metal?

A. The hooks will catch in wood; sure. [129—88]

Q. They will catch on something that is sticking up quicker than they would against a smooth surface?

The COURT.—Oh, anyone knows that.

Mr. BASSETT.—That is something he has not explained to us as yet; and another witness has testified about that too.

Q. You say you are supposed to pull on these gangions? A. Yes.

Q. When do you start to pull on them?

A. As soon as they get up over the roller.

Q. And it is likely to catch before it gets over the roller? A. It might catch under the deck.

Q. It might catch under the deck?

A. You get that much slack, and then you go and get right ahold of the lever and stop.

(Testimony of Severine Holmess.)

Q. Is it more likely to catch an something when you are pulling in hard, when you are forcing it?

A. No.

Q. You don't think so?

A. No, all the time you give them that much slack. That is so you can get hold of the roller before it gets past, when the winch is pulling.

Q. The winch does all of the pulling on the line?

A. Yes.

Q. These gangions would come up anyhow?

A. Yes.

Q. You do not have to stand over there hanging over the side of the ship to take these by hand and pull them; they come up soon enough if you let it run? A. Yes. [130—89]

Q. You say Captain Langnes has told you to be careful? A. Yes.

Q. Did you ever tell him to be careful and cover the side of the vessel? A. No.

Q. Do you think that being uncovered makes it more dangerous than it would have been if it had been covered? A. I don't think so.

Q. You don't know? A. No.

Recross-examination.

(By Mr. BRONSON.)

Q. Did you ever see chain plates covered on any boats in your experience, prior to this accident, covered with sheet iron?

A. No, I did not. I think there are more boats

(Testimony of Severine Holmess.)

without covering on the chain plates than there are covered.

Q. Boats which have the roller next to the backstays such as this boat? A. Yes.

Q. Is that the customary place for the roller?

A. Yes.

Q. How many boats are there in this fleet of boats like the "Aloha"?

A. I just could not say, Mr. Bronson.

Q. Have you any idea?

A. No; I ain't sure of the number. [131—90]

Q. Is it a hundred or more?

A. Oh, yes, there is many hundreds.

Q. You don't know of any vessels—?

Mr. BASSETT.—(Interrupting.) He did not say that. He said some had and some had not. Why should you try to lead him in that way. I object to that as improper recross-examination.

Q. Do you know of any boats which had the chain plates covered prior to this accident?

Mr. BASSETT.—He said he did.

Mr. BRONSON.—Let the witness state.

Mr. BASSETT.—He has already answered the question.

The COURT.—Answer the question.

A. No, I never seen any other boats covered.

Q. You never seen any?

A. I never noticed them. They may have done it; but I did not notice it.

Q. Did you notice who stopped the winch when the hook caught Mr. Green? A. The captain did.

(Testimony of Severine Holmess.)

Q. Do you know where he was standing?

A. He was standing in the pilot-house.

Q. Forward? A. Yes.

Q. On which side? A. On the starboard side.

[132—91]

Redirect Examination.

(By Mr. BASSETT.)

Q. He was standing there looking at him, was he? A. Yes.

Q. Did you have any trouble with a hook striking you in the eye? A. Yes.

Q. Did you lose the sight of one of your eyes?

A. Not the sight, but I cannot see very good.

Q. Is it not a fact, Mr. Holmess, that you were injured in going forward to shut off that lever that you told us about? A. Yes.

Mr. BASSETT.—That is all.

Recross-examination.

(By Mr. BRONSON.)

Q. Where were you at the time? What boat?

A. I was on the "Reliance."

Q. Another vessel, was it?

A. Yes, another vessel.

Q. You were not injured at all on this boat, were you? A. No, sir.

Q. In what way were you injured? By falling against something?

A. No; a hook was fast under the vessel.

Q. A hook was fast under the vessel? What happened to you?

(Testimony of Severine Holmess.)

A. I put the strain on the gear, and I was ahead of the roller instead of being behind the roller. I had been [133—92] ahead of the roller as it led over the gear, and there was no chance for me to get away; and I dodged back; and I could not do that either; and I just caught hold of it.

Q. Did a hook catch on the vessel?

A. It caught under the vessel.

Q. You were hurt in that way?

A. Yes; the hook came back and hit me in the eye.

Q. How do you know it was caught under the vessel?

A. I could not see the hook. It was caught fast under the vessel. It was under the hull of the vessel.

Q. How do you know that?

Mr. BASSETT.—I don't think that is material.

The COURT.—I don't think so. Objection sustained.

Q. You say it was not the same boat; but the lever was along the rail as it was here?

A. No, it was about two feet further ahead.

Q. You reached forward to shut it off, and when you did that, the hook came up and caught you in the eye? A. Yes.

Q. Did you tell Green about that before he got hurt?

Mr. BASSETT.—I don't think that is material.

The COURT.—Objection sustained.

(Witness excused.) [134—93]

TESTIMONY OF AXEL EDWARDS, FOR CLAIMANT AND RESPONDENT.

AXEL EDWARDS, called as a witness on behalf of respondent and claimant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BASSETT.)

Q. Your name is Axel Edwards? A. Yes.

Q. Were you on board the "Aloha" when Mr. Green was injured in May, 1927? A. I was.

Q. What was your employment upon that vessel?

A. I was cook.

Q. You had tended ground-line at some time?

A. Yes, I used to coil the line. I was standing behind the winch, coiling the line.

Q. You never handled the roller? A. No.

Q. Were you present when Mr. Green was injured? A. I was.

Q. How far away were you?

A. I was back of the table, bending up gear.

Q. Handing you Respondent's Exhibit "A–4," do you recognize that as being a picture of the starboard side of the vessel "Aloha," and of the roller being used at the time? A. Yes.

Q. Do you recognize that? A. Yes.

Q. Did you, on this voyage, and before this accident, hear [135—94] Mr. Green complain to Captain Langnes about the fact this arm was dangerous? A. Well, I heard him talk about it.

(Testimony of Axel Edwards.)

Q. You heard him talk about it? A. All of us.

Q. All the men on the boat? A. Yes.

Q. What did he say about it?

A. That it was dangerous.

Q. That the hooks were catching on the iron?

A. Yes.

Cross-examination.

(By Mr. BRONSON.)

Q. When did you hear this talk going on?

A. During this trip.

Q. You mean after the accident?

Mr. BASSETT.—He said before.

Q. After the accident?

A. Well, I heard it before, too.

Q. What was it you said you heard?

A. I heard the hook catch.

Q. Catching where? A. On the side.

Q. Catching on the side? A. Yes.

Q. Did you ever hear Captain Langnes tell the members of the crew, including Mr. Green, to use both hands in tending ground line? [136—95]

A. I don't know that he did that.

Q. You did not hear it, you don't know?

A. No, I did not, no.

Q. Did you ever tend line, or done any work standing by the lever? A. Not on that boat; no.

Q. Have you ever done it in any boat?

A. Yes.

Q. Have you ever had any experience with hooks catching on various parts of the vessel? A. Yes.

(Testimony of Axel Edwards.)

Q. Would you say that was a common occurrence? A. Yes.

Q. In your experience? A. In my experience.

Q. What would you do when they caught?

A. Either stop the winch myself, or have someone else stop it.

J. Then you can stop it? A. Yes.

Q. Disengage the hooks and untangle them?

A. Yes.

Q. Do you know whether it is customary to use one or two hands in tending the gangions, while tending on the roller?

A. I usually use two myself.

Mr. BASSETT.—That was not the question.

Q. Do you know what is customary?

A. Some use two, and some use one; it all depends upon [137—96] where the gear comes.

Q. Why do you use two hands?

A. Because it is easier to clear them.

Mr. BRONSON.—That is all.

Redirect Examination.

(By Mr. BASSETT.)

Q. Now, you said the men were complaining. Were they complaining about the hooks catching on something, or anything?

A. Complain of anything. I never looked over the side. I don't know. I had no occasion to.

Q. Did you hear them mention this vertical iron?

A. I don't remember it.

Q. Do you remember whether that iron was sub-

(Testimony of Axel Edwards.)

sequently covered with zinc before the voyage was over?

A. I can't tell, because I never looked. I had no reason to go there and look.

Q. But you did hear Green make a complaint?

A. He and the other boys were talking about it.

Q. Did you notice the hook when it was taken out of Green's eye? A. No, I did not.

Q. In your experience, is it safer to step forward and throw out the lever when the hook catches or run away, and get out of the way?

A. Well, I don't know which would be the safest.

Q. You don't know which would be the safest?

A. No; if you can stop it, yes— [138—97]

The COURT.—Oh, that is improper. Some do one thing and some another.

(Witness excused.)

Mr. BASSETT.—I think that is all. We rest at this time.

The COURT.—Is there anything?

Mr. BRONSON.—At this time, the petitioner challenges the sufficiency of the evidence of the claimant on the question of total exemption.

The COURT.—What have you to say about that?

Mr. BASSETT.—I have a motion to make on my own behalf.

The COURT.—Make your motion.

Mr. BASSETT.—At this time I renew the motion I made at the close of—at the beginning of the case, and at the close of Mr. Langnes' testimony on

the question of the right to limit liability in this case.

The COURT.—What have you to say about Mr. Bronson's motion. If his motion is well taken, then your motion is superfluous.

(Argument of counsel.)

The COURT.—The first thing for the Court to determine is whether there is any liability; and if there is any liability, then may it be limited? That is the order in which the Supreme Court has very recently stated the case must be disposed of. Now, [139—98] I will hear both of you gentlemen on the respective motions. I would rather hear from Mr. Bassett whether any negligence is shown upon the part of the owner.

(Argument of counsel, with citation of authority.)

The COURT.—In an opinion of the Supreme Court, in a case which was decided within the last nine months, Judge Taft said the whole thing was —and I passed upon that very recently at Los Angeles, and I am familiar with it, and these cases cited have no bearing.

To consider this case in its broadest aspect, that, as between employer and employee, the primary relation carries with it certain obligations: That the employer must furnish the employee a reasonably safe place within which to work; while the employee assumes all of the hazards that are either known to him, or open and obvious, or suggestive of danger.

Now, in this case we have the testimony of the claimant himself,—in fact, there is not much dis-

pute in the evidence here. And I want to say now, that I do not know when I have tried an admiralty case where the principal litigants impressed me as being so fair and honest in their testimony as in this case.

Take the claimant himself, the injured man. He testified frankly and fairly, and I am satisfied honestly, in relation to every question propounded to him; and the owner the same way; open, frank, fair, both of them. So I say, there is not much difference between the testimony; and the thought has come to me [140—99] several times, it is truly an inspiration, when litigants come into court, and tell the truth to the Court on the witness-stand.

Now, in this case, the injured man saw the relation—he saw the ground wire,—is that what you call it?

Mr. BASSETT.—The ground-line.

The COURT.—The ground-line; solve the relations of the gangions to that line. Those gangions are 52 inches long, and placed at intervals along the ground-line, about 8 feet apart, on this ground-line, which was 1,800 feet long.

Now, this ground-line had to be drawn into the boat, and the gangions had to be disentangled from the ground-line; and that was the business of the men employed for that purpose. They were instructed by the owner how that should be done.

The claimant in this case has been a fisherman for many years, and he knew how those things were done, and what was required to be done and as he says himself, as this went along, he saw how these

hooks were catching, and that sometimes they caught, or stopped by catching, and it was necessary to stop the winch; and when asked whether he could have moved the lever, he said he thought he could not, because the gangions stretched quite a little and that he could have moved the lever if he thought it was necessary to do it. And then, he says he complained to the owner about the hole, the third hole, that he did not like it in relation to the roller; and then, Mr. [141—100] Holmess testified just now that—what is the claimant's name—that Green said he was aware of the situation. Then, there we have the whole situation. Green knew the danger of these hooks; these hooks had snapped before; and they had caught. He made a complaint to Langnes, as was testified, in the presence of other people, that he was scared. Now then, it was not sufficient for him to complain, and to make the danger known; it was his duty to quit; it was his duty to quit work unless repairs were made, or a remedy made; and the only excuse that would justify him in not quitting would be the promise on the part of Langnes to remedy these conditions, and then, if it had not been remedied within a reasonable time or cost.

Now, in this case, the whole situation was open and obvious; he knew of it; but he continued to assume the risk.

There is nothing here in the evidence at all that would indicate that Langnes was in any way negligent in the performance of any duties required to be done by him, or the omission to do anything that

he should have been required to do. Why, if this case was tried in any court, I don't care where, either state or federal court, why, you would not—it never would get anywhere; and for this Court to hold that, why, it would be absolutely wrong, and in violation of every rule of negligence known to me; and I have tried a good many negligence cases.

So that the motion of the owner must be sustained. [142—101] There is no negligence that has been established in this case upon the part of the owner; and no negligence having been established, why, of course, limitation is not necessary, because there is no liability; and that will be the ruling of the Court, that the motion will be granted and the claim dismissed.

Mr. BASSETT.—May I say a word concerning—

The COURT.—(Interrupting.) You may note the exception.

Mr. BASSETT.—Note my exception. I want to say this: Your Honor has undoubtedly stated the common-law doctrine of assumed risk; but that doctrine has no application to seamen; it is not reasonable to expect a seaman to leave the ship, and quit his work even if he should see or observe a dangerous situation, he knows nothing about. Because that would be mutiny.

The COURT.—I see no negligence in this case.

Mr. BASSETT.—Allow us an exception.

The COURT.—Yes.

Mr. BASSETT.—We wish an exception to the granting of petitioner's motion also.

The COURT.—Note the exception. I should probably state there is not anything shown in this case that there was anything about the boat that was in any way dangerous, or out of harmony with the usual construction and the mere fact that the owner afterwards put on sheet iron on a part of it that is no evidence of negligence, no matter what time this was performed.

Mr. BASSETT.—Allow us an exception to the Court's refusal to grant our motion to dismiss. [143—102]

The COURT.—Yes, exception may be noted to everything.

Mr. BASSETT.—And to the granting of petitioner's motion, petitioner is not entitled to limit its liability in this case; and I give notice of appeal at this time.

Mr. BRONSON.—I will file a formal order.

Mr. BASSETT.—And I will file a formal notice of appeal later.

The COURT.—Yes. [144—103]

[Title of Court and Cause.]

COURT'S CERTIFICATE TO THE TRANSCRIPT OF EVIDENCE OR STATEMENT OF FACTS.

I, Jeremiah Neterer, one of the Judges of the above-entitled court, hereby certify that the statement of facts, or transcript of evidence, to which this certificate is attached, consisting of pages 1

to 103, and Court's opinion, pp. 99–103, inclusive, is a true, complete and properly prepared statement of all of the testimony introduced upon the trial of said cause before me on its merits in the above-entitled court on the 22d day of January, 1929, together with all objections and exceptions made and taken to the admission or exclusion of evidence, and all motions and rulings by the Court thereon made upon said trial, together with the original exhibits offered and admitted in evidence upon said trial, together with the opinion of the Court rendered at the close thereof, and the said statement of facts or transcript of evidence, is hereby ordered filed in said cause and made a part of the record of the said cause on appeal.

Done in open court this 1st day of July, 1929.

JEREMIAH NETERER,
United States District Judge.

O. K.—BRONSON, JONES & BRONSON,
Proctors for Petitioner and Appellee.

[Endorsed]: Filed Jul. 1, 1929. [145]

[Title of Court and Cause.]

DECISION.

January 25, 1929.

Upon the hearing of the petition to limit liability to the value of the vessel (Secs. 4283, 4284, 4285, R. S., and amendatory and supplemental acts) and

to test liability and the liability of the vessel for any damages for the injury, the Court denied claimant's motion to dismiss the petition at the close of petitioner's testimony, and at the conclusion of the evidence of claimant, upon motion of the petitioner, dismissed the claim of liability of the claimant on the ground that no negligence was shown or any act of commission or omission of imposed duty on the part of the petitioner, and omission of claimant of imposed duty was the proximate cause of the injury.

The evidence fairly established that the petitioner, sole owner of the motorship "Aloha," and claimant and three others—all fishermen—entered into an agreement for a venture in halibut fishing during the season of 1927, the petitioner to act as master. The proceeds of the venture were to be divided: one-fifth of the gross earnings to the vessel, and after the payment of expenses, the balance to be divided equally between the petitioner and the other fishermen, one of whom also acted as engineer.

The vessel was in all respects seaworthy, efficiently manned, equipped, furnished and fitted with suitable machinery, tackle, apparel, appliances, etc., in customary manner, suitable for the venture. The claimant had been engaged as a fisherman for many years; that all of the fishermen on the said vessel were instructed by the master, petitioner, the usual and customary manner of operation of the ground-line, which is a line about 1,800 feet long to which are attached gangions 52 inches long

and placed at intervals of 8 feet; to the end of the gangions halibut hooks are attached. The ground-line is hauled into the vessel over rollers by use of a winch,—lever controlled. The fisherman was required to operate the winch and to disentangle the gangions from the ground-line, and if halibut were hooked to detach them and put them in the boat. Such was the duty of the claimant at the time of his injury, and he was instructed by the owner that the usual method of doing it was by the use of [146] both hands, and if the hooks caught in the ground-line or elsewhere and became entangled, to move the lever and stop the winch until the gangion and the hook were disentangled. One of the hooks hooked on some object on or about the vessel or ground-line, and the gangion, drawn taut by the moving winch, snapped and struck claimant in the eye, causing serious injury. When asked whether he could have moved the lever and stopped the winch, the claimant said he thought he could, that the gangions would stretch quite a little and that he could have moved the lever if he had attempted to do so, but did not do so. All of the dangers were known to the claimant; they were open and obvious; they were the usual and ordinary hazards necessarily attendant upon the undertaking.

The vessel thus equipped had been engaged in fishing for some years, and its construction was in the usual, customary fashion.

G. E. STEINER and BRONSON, JONES & BRONSON, Proctors for Petitioner.

SAMUEL B. BASSETT, Proctor for Claimant.

NETERER, District Judge.—The vessel and equipment being of customary and standard construction, and there being no act disclosed in which the petitioner lacked in the performance of duty imposed, or performed in violation of imposed duty, he is entitled to total exemption. The most perfect appliances or equipment are not required, but customary employment and good order is the test. Ubbergen 1925 A. M. C. 557; The Edgar F. Luckenbach, 1927 A. M. C. 1185.

It may also be said that by the failure of the fisherman to use the safety appliances provided, known to him, and the violation of specific orders with relation to the employment of both hands in disentangling the hook and not moving the lever conveniently placed and stopping the winch when entangling hooks were apparent, pursuing unsafe methods in performance of duty, he assumes the hazards known, or open, obvious and apparent, and necessarily attendant upon the undertaking.

When a master provides safeguards against danger and specifically instructs with relation to the performance, and injury results because of omission to employ the safety appliances or follow specific instructions for operation in usual manner, recovery for injury may not be had.

Formal order may be presented on notice.

NETERER,
U. S. District Judge.

[Endorsed]: Filed Jan. 25, 1929. [147]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 12,189.

In the Matter of the Petition of AXEL LANGNES, Sole Owner of the Diesel Halibut Vessel "ALOHA," Her Engines, etc., for Exemption from or Limitation of Liability.

FINAL DECREE.

A verified libel and petition having been filed in this court by the above-named petitioner on February 4, 1928, praying for exemption from or limitation of liability for certain loss, damage, destruction and injury growing out of an accident which occurred on board his Diesel halibut vessel "Aloha," on or about the 13th day of May, 1927, on the high seas; and an order having been duly entered pursuant to stipulation of the parties whereby the interest of petitioner in the said vessel and her pending freight was fixed at the sum of five thousand dollars as of the date of May 27, 1928, and petitioner having duly filed an approved stipulation in such amount.

And an order having been duly entered directing a monition to issue under the seal of this court against all persons claiming damages for any loss, destruction, damage or injury arising from or growing out of said occurrence on board said vessel, citing them to appear before this court and make due proof of their respective claims on or before the 20th day of March, 1928, and designating A. C. Bowman, Esq., as the commissioner before whom claims should be presented in pursuance of said monition; and upon the return of said monition proclamation having been duly made for all persons claiming damages for any and all loss, damage, destruction or injury aforesaid to appear [148] and answer said libel and petition and to present their claims, and Winfield A. Green, having presented a claim for personal injury in the amount of $25,000.00, as will more fully appear by reference to the commissioner's report filed April 2, 1928, and stating said claim to the Court, and no other person having presented any claim, and defaults of all other persons having been duly entered on the 24th day of September, 1928, and the said claimant having heretofore filed a motion to dissolve the restraining order theretofore issued and to dismiss the petition upon the grounds that the court was without jurisdiction and said motion having been argued and submitted by written memoranda of points and authorities on the 12th day of July, 1928, and the Court on said date having orally announced the denial of said motion and each part thereof, and having on December 24, 1928, en-

tered an order denying claimant's said motion to dissolve the restraining order and to dismiss the said petition, and the said claimant having thereupon answered the said libel and petition and the cause having come on for trial on January 22, 1929, upon the pleadings and proof of the petitioner, and the claimant at the opening of said trial having filed exceptions to the petition upon the grounds that not sufficient facts were contained in said petition to entitle petitioner to limitation of liability, and that the facts averred in the petition show that the above-entitled court is without jurisdiction, and the Court having orally overruled said exceptions in affirmance of said order of September 24, 1928, and upon the trial being had, petitioner having moved for a decree dismissing claimant's claim and granting total exemption upon the close of claimant's case, and the Court having heard and considered the argument of proctors for the respective parties and having filed his written decision [149] herein upon the 25th day of January, 1929, holding that the circumstances occurring on board said vessel and the loss, destruction, damage and injury arising therefrom were not caused by the design or neglect of the petitioner or with his privity or knowledge and that no negligence or fault rests with said vessel or said petitioner in connection with said occurrences and said loss, destruction, damage and injury arising therefrom, and that the said loss, destruction, damage and injury was occasioned solely because of the negligence and fault of the claimant herein, and proctor for

claimant having given notice of his intention to appeal in open court on said 22d day of January.

Now, on motion of Bronson, Jones & Bronson, proctors for petitioner, it is by the Court

ORDERED, ADJUDGED AND DECREED:

1. That the accident described in the libel and petition herein and the loss, destruction, damage and injury arising therefrom, was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner.

2. That the said petitioner be, and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from or growing out of the said occurrence happening on board said vessel, "Aloha," on or about said 13th day of May, 1928, and

3. That said petitioner recover from the claimant, Winfield A. Greene, his costs incurred in establishing his exemption from liability in this proceeding to be taxed, and

4. That claimant's exceptions to the petition grounded [150] upon alleged want of facts and alleged want of jurisdiction filed herein on the 22d day of January, 1929, be and each of said exceptions is hereby overruled.

5. That the stipulators for petitioner's costs and expenses, and the stipulators for petitioner's *ad interim* and final stipulation for value be, and each of them is hereby exonerated and discharged from further liability upon their respective stipulations.

Done in open court this 4th day of March, 1929.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Copy received Feb. 27, 1929.

SAMUEL B. BASSETT,
Attorney for Winfield A. Greene.

[Endorsed]: Filed Mar. 4, 1929. [151]

[Title of Court and Cause.]

ORDER EXTENDING NOVEMBER TERM, 1928, FOR THIRTY DAYS FOR PERFECTING APPEAL.

Upon the stipulation of the parties hereto, viz., petitioner and claimant, Winfield A. Green, for an order of Court extending the November, 1928, term of the above-entitled court,—

IT IS HEREBY ORDERED that said November, 1928, term be, and it hereby is extended in the above-entitled cause for the full period of thirty days from the date of its expiration on May 7th, 1929. Said extension of term is granted for the purpose of retaining jurisdiction of said cause in order to perfect claimant's appeal.

Done in open court this 2d day of May, 1929.

JEREMIAH NETERER,
United States District Judge.

The foregoing order may be entered. Dated at Seattle, this 1st day of May, 1929.

BRONSON, JONES & BRONSON,
Proctors for Petitioner.
SAMUEL B. BASSETT,
Proctors for Claimant.

[Endorsed]: Filed May 2, 1929. [152]

[Title of Court and Cause.]

NOTICE OF APPEAL.

Claimant, Winfield A. Green, appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain final decree entered in the above-entitled cause on the Fourth day of May, 1929.

Signed at Seattle this 28th day of May, 1929.

SAMUEL B. BASSETT,
WINTER S. MARTIN,
Proctors for Claimant-Appellant.

Copy of the foregoing notice of appeal received this 29th day of May, 1929.

BRONSON, JONES & BRONSON,
Proctors for Petitioner.

[Endorsed]: Filed May 29, 1929. [153]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

The claimant hereby assigns as error to the proceedings and final decree of the District Court in the above-entitled cause, as follows:

First. The District Court erred in overruling the claimant's motion to dissolve the order restraining him from prosecuting his action in the Superior Court of the State of Washington, for King County.

Second. The District Court erred in overruling claimant's exceptions to the petition.

Third. The Court erred in overruling claimant's challenge to the sufficiency of the petitioner's evidence to entitle him to a limitation of liability.

Fourth. The District Court erred in overruling claimant's motion to dissolve the restraining order and dismiss the petition made at the close of the claimant's evidence.

Fifth. The District Court erred in entering a final decree dismissing the claim and exempting the petitioner from all liability.

SAMUEL B. BASSETT and
WINTER S. MARTIN,
Proctors for Appellant.

Copy received this 28th day of June, 1929.

BRONSON, JONES & BRONSON,
Proctors for Appellee.

[Endorsed]: Filed Jun. 28, 1929. [154]

[Title of Court and Cause.]

MOTION FOR LEAVE TO SUE AND PROSECUTE APPEAL IN THE ABOVE CAUSE WITHOUT PREPAYING COSTS OR FURNISHING SECURITY THEREFOR.

Comes now Winfield A. Green, claimant, and moves for leave to defend the above-entitled cause and to prosecute his appeal from the final decree in said cause to the Circuit Court of Appeals for the Ninth Circuit without prepaying costs or furnishing security therefor.

This motion is based on the following grounds, viz.:

(1) That appellant is a seaman who, under the Act of Congress of July 1st, 1918, is entitled to prosecute his appeal without prepaying or furnishing security for costs, to wit:

> "That Courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

(2) That he is a citizen of the United States. That he is a poor person who cannot prepay costs nor furnish security therefor. That he has filed, in said court, pursuant to the Act of [155] Congress in such cases made and provided,

"a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or writ of error or appeal,"

and that he has set forth,

"briefly the nature of his alleged cause of action or appeal."

(3) That in support of his said motion on both grounds, claimant has filed and attached hereto his affidavit setting forth statements which shows him to be entitled to relief on each of said grounds.

SAMUEL B. BASSETT,
WINTER S. MARTIN,
Proctors for Claimant-Appellant.

[Endorsed]: Copy of within motion received this 29th day of May, 1929.

BRONSON, JONES & BRONSON,
Proctors for Petitioner.

[Endorsed]: Filed May 29, 1929. [156]

[Title of Court and Cause.]

AFFIDAVIT OF WINFIELD A. GREEN IN SUPPORT OF MOTION FOR LEAVE TO SUE AND PROSECUTE APPEAL IN THE ABOVE CAUSE WITHOUT PREPAYING COSTS OR FURNISHING SECURITY THEREFOR.

State of Washington,
County of King,
In the Western District of Washington,—ss.

Winfield A. Green, being first duly sworn upon his oath, deposes and says: That he is the sole claimant in the above-entitled limitation proceeding. That he makes this affidavit for the purpose of procuring an order permitting him to prosecute his appeal in the above-entitled cause to the Circuit Court of Appeals for the Ninth Circuit, without prepaying costs, making deposit, or furnishing security for costs and expenses of appeal, either in the above-entitled court or in the said Circuit Court of Appeals.

1. Affiant further deposes that he is a citizen of the United States.

2. That he is at all times mentioned in the above-entitled proceeding, was a seaman by permanent vocation and occupation, to wit, a halibut fisherman.

3. Affiant further deposes that because of his poverty he is unable to pay the costs of appeal to the Circuit Court of Appeals in the above-entitled

action; that he has no money or property, and cannot furnish a bond or give security for the same. [157]

4. Affiant further deposes that because of his poverty he is unable to pay the costs necessarily incurred in the above-entitled cause in defending his claim and resisting the petition to limit liability and exonerate from all liability in the above cause. That he has no money or property and cannot give a bond, make a deposit or furnish security for said costs which may be incurred by him in the defense of the above-entitled cause in the District Court.

5. Affiant brought action in the Superior Court of Washington against petitioner in the above proceeding to recover damages for personal injuries based upon unseaworthiness of the fishing vessel "Aloha," and for negligence in her operation under section 33 of the Merchant Marine Act of 1920 incorporating the applicable portions of the 2d Employers' Liability Act of 1908 for injuries to employees on interstate railroads. The action in the state court was based on the obligation of the employer vessel-owner to furnish a safe place to work and safe and suitable gear and equipment, to wit, a seaworthy vessel properly equipped. The case in the state court alleged a failure in such duty and obligation in that a trawl line in being hauled in by power due to the negligent manner of hauling in and the manner of equipment of the vessel at the place of contact with the rail where the long heavy trawl or ground-line came in from

the sea, permitted loose hooks attached to the main trawl lines 5 or 6 feet in length to catch on the side of the vessel. That the vessel and her gear and equipment were unseaworthy in not being guarded by smooth sheathing irons so that the loose hooks would not catch while the trawl was coming in rapidly over the rail by [158] a power winch or *girdie*. The owner (petitioner in the above cause) was on board the "Aloha" at the time of claimant's injury and was privy to, and had knowledge of what occurred. Claimant contends that as the owner was on board at the time and was privy to and had full knowledge of what occurred, that he cannot have a limitation of or exoneration of liability in the above-entitled court, thereby depriving claimant of his right to proceed in the state court with his right of trial by jury. The petitioner claims the right in the above-entitled cause to file a petition to limit liability in the above court, and that the Court will then pass upon the entire question of liability regardless of the fact that petitioner was on board his ship directing its operations and was privy to and had full knowledge of all of the facts and circumstances upon which liability rests. That affiant lost an eye and is permanently disabled because of the negligence of petitioner and the unseaworthiness of the said vessel and resisted the petition for said reason. That affiant believes he has a meritorious ground for appeal, to wit, the United States District Court is without jurisdiction of the cause when it is shown

that the owner was on board at the time of injury and had full knowledge of all that happened.

That by reason of the foregoing premises, affiant believes that he is entitled to the redress he seeks, to wit, the dismissal of the foregoing cause upon this appeal for the reasons stated.

WINFIELD A. GREEN.

Subscribed and sworn to before me this 10th day of June, 1929.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Rec. copy above June 10, 1929.
BRONSON, JONES & BRONSON,
Attys. for Petitioner.

[Endorsed]: Filed Jun. 10, 1929. [159]

[Title of Court and Cause.]

ORDER PERMITTING DEFENSE OF SUIT AND PROSECUTION OF APPEAL WITHOUT PREPAYING COSTS OR FURNISHING SECURITY THEREFOR.

Proctor for claimant, Winfield A. Green, having moved for an order of Court permitting him to defend the above cause and prosecute his appeal to the Circuit Court of Appeals from the final decree entered in said cause without prepaying costs, making deposit or furnishing security therefor, and

it appearing to the Court from the affidavit filed with said motion that:

1st. That claimant is a seaman who, under the Act of Congress of July 1, 1918, is entitled to defend said cause and prosecute his appeal from said final decree without prepaying costs, making deposit therefor, or furnishing security therefor; and

2d. That claimant is a citizen of the United States who is a poor person who, because of his poverty as appears from his affidavit, is unable to prepay said costs or furnish security therefor,

WHEREFORE, IT IS ORDERED that claimant, Winfield A. Green be and he is permitted to defend to conclusion and prosecute in the Circuit Court of Appeals his appeal from the final decree in said cause without being required to prepay fees or costs for the printing of the record in the appellate court or to give security therefor, and without being required to prepay costs of suit or furnish [160] security therefor in the above-entitled court.

IT IS FURTHER ORDERED that the officers of court shall issue, serve all process, and perform all duties in such cases.

Done in open court this 18th day of June, 1929.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 18, 1929. [161]

[Title of Court and Cause.]

ORDER EXTENDING TIME THIRTY DAYS WITHIN WHICH TO LODGE APPELLATE RECORD IN COURT OF APPEALS.

Upon application of appellant's counsel for an order extending the time within which to lodge apostles in above cause in the U. S. Circuit Court of Appeals for the Ninth Circuit,—

IT IS ORDERED that the time within which appellant in the above cause may lodge and file certified apostles in the above cause is hereby extended thirty days from the date of its expiration, viz., from June 29th to July 15th, 1929.

Done in open court this 24th day of June, 1929.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 24, 1929. [162]

[Title of Court and Cause.]

STIPULATION AGREEING TO OMIT FROM THE RECORD CERTAIN DOCUMENTS AND PAPERS NOT ESSENTIAL TO DECISION, PURSUANT TO SUBDIVISION 4 OF ADMIRALTY RULE 4 FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED between the respective parties hereto acting by and through

their proctors that the following designated documents and papers filed in the above-entitled court and cause may be omitted from the apostles on appeal, and the Clerk of the said District Court shall omit from the said record the said designated papers, viz.:

1. Petitioner's stipulation for costs.
2. Ad interim stipulation of February 4th, 1928.
3. Order for ad interim stipulation.
4. Affidavit of Axel Langnes *re* earned freight and value of "Aloha" dated February 3, 1928.
5. Affidavit of Benson *re* value of "Aloha."
6. Appearance of George Steiner.
7. Praecipe of Mr. Bronson for monition for limitation proceedings.
8. Appearance of Messrs. Bronson, Jones & Bronson.
9. Appearance of Mr. Vanderveer.
10. Points and authorities attached to motion to dismiss.
11. Claimant's supplemental brief on motion to dissolve restraining order. [163]
12. Praecipe for subpoena for Edwards et als.
13. Subpoena for Edwards, Peterson, Holmes and Brieland.
14. Subpoena for Cunningham.
15. Motion for leave to file amended answer.
16. Appearance of Winter S. Martin.
17. Memo. of costs and disbursements.
18. Notice of hearing motion to sue as poor person.

IN WITNESS *HEREOF* the parties hereto have by their respective proctors at Seattle this 27th day of June, 1929, set their hands.

SAMUEL B. BASSETT,
WINTER S. MARTIN,
Proctors for Appellant.
BRONSON, JONES & BRONSON,
Proctors for Appellee.

[Endorsed]: Filed Jun. 28, 1929. [164]

[Title of Court and Cause.]

STIPULATION RE ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED and agreed by and between the proctors for the respective parties hereto that none of the exhibits herein need be reproduced in the record on appeal, but all exhibits herein may be transmitted to the Circuit Court of Appeals for the Ninth Circuit in their original form and may be used by either party on the argument of said appeal with the same force and effect as if said exhibits were included in the foregoing transcript of record.

Dated at Seattle, Washington, this 28 day of June, 1929.

BRONSON, JONES & BRONSON,
Proctors for Petitioner-Appellee.
WINTER S. MARTIN,
SAMUEL B. BASSETT,
Proctors for Claimant-Appellant.

On consideration of the above stipulation, it is so ordered this 1st day of July, 1929.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Jul. 1, 1929. [165]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court, Clerk's Office, U. S. District Court, Seattle, Washington:

Please prepare record on appeal in the above cause, which shall include the following, viz.:

1. Names and addresses of proctors.
2. Style of the court and cause.
3. The names of the parties.
4. Stipulation of counsel agreeing upon $5,000 as the value of "Aloha," her tackle, etc. and pending freight.
5. Stipulation (bond) of appellee and surety, binding themselves to pay the agreed value of $5,000 with interest.
6. Petition by appellee to limit liability and to exonerate from all liability, together with the exhibits, if any, attached.
7. Amended answer of appellant.
8. Claim of Winfield A. Green.
9. Finding and order of Commissioner Bowman allowing claim of Winfield A. Green.

10. Motion to dissolve restraining order and to dismiss petition. [166]
11. Order noting defaults.
12. Order denying claimant's motion to dismiss petition.
13. Exceptions to petition.
14. Order overruling exceptions to petition.
15. Journal entry showing case called for trial before Judge Neterer and that witnesses appeared and testified in open court.
16. All of the testimony of both parties taken in the case, together with the exhibits of the case annexed thereto.
17. Memo decision.
18. Final decree.
19. Order extending November Term, 1928, for 30 days.
20. Notice of appeal, May 28th, 1929.
21. Motion for leave to sue and prosecute appeal in said cause without prepaying costs or furnishing security for same.
22. Affidavit of Winfield A. Green that he is a seaman and poor person, in support of motion.
23. Order permitting defense of suit and prosecution of appeal without prepaying costs, without printing record, etc.
24. Order extending time within which to lodge appellate record in the Circuit Court of Appeals.
25. Assignment of errors.
26. Stipulation omitting parts of record.

27. Praecipe for appellate record.
28. Stipulation and order *re* exhibits.

SAMUEL B. BASSETT and
WINTER S. MARTIN,
Proctors for Appellant.

Copy of within praecipe recd. June 28, 1929.

BRONSON, JONES & BRONSON,
Proctors for Appellee. [167]

[Endorsed]: Filed Jun. 28, 1929. [168]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten *transcript of record,* consisting of pages numbered from 1 to 168, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, in the above-entitled cause, from the judgment of said United States District Court for the Western District of Washington, to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [169]

Clerk's fee (Act Feb. 11, 1925), filing notice of appeal (Sec. 5 of Act)	$ 5.00
Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 401 folios, at 15¢	60.15
Certificate of Clerk to Apostles on Appeal, with seal	.50
Certificate of Clerk to original exhibits, with seal	.50
Total	$66.15

I hereby certify that the above cost for preparing and certifying record, amounting to $66.15, has not been paid to me by virtue of an order entered in the cause permitting defense of suit and prosecution of appeal without prepaying costs or furnishing security therefor, a copy of said order being included in the foregoing apostles at page 160 thereof.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 9th day of July, 1929.

[Seal] ED. M. LAKIN,
Clerk, United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [170]

[Endorsed]: No. 5877. United States Circuit Court of Appeals for the Ninth Circuit. Winfield A. Green, Claimant of the Diesel Halibut Vessel "Aloha," Her Engines, etc., Appellant, vs. Axel Langnes, Owner, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 11, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5877

United States

Circuit Court of Appeals

For the Ninth Circuit.

WINFIELD A. GREEN, Claimant of the Diesel Halibut Vessel "ALOHA," Her Engines, etc.,
Appellant,

vs.

AXEL LANGNES, Owner,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the September Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Tuesday, the seventeenth day of September, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK S. DIETRICH, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable HAROLD LOUDERBACK, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Winter S. Martin, proctor for the appellant, and by Mr. Robert E. Bronson, proctor for appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-first day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honor-

able FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, and Harold Louderback, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before DIETRICH and WILBUR, Circuit Judges, and LOUDERBACK, District Judge.

WILBUR, Circuit Judge.—Appellant brought an action against the appellee in the Superior Court of the State of Washington for the recovery of $25,000 damages for the loss of his eye as a result of an injury by a fish-hook alleged to have been due to appellee's negligence while the appellant was

a member of the crew of the "Aloha" on an expedition fishing for halibut on the banks off the coast of British Columbia. The appellee is the owner and master of the "Aloha" and as such had control of the fishing boat at the time of the accident. The appellee thereafter filed this libel in admiralty to limit his liability for such an injury as owner of the "Aloha" under § 4283, et seq., Revised Statutes, 46 U. S. C. A., § 183, to the value of the boat, about $5,000, and to enjoin the further prosecution of the suit in the state court. The appellee alleged in his libel,

> "That petitioner desires to claim the benefits of sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto, and in this proceeding by reason of the facts and circumstances hereinbefore set forth, petitioner further desires to test its liability and the liability of said M. S. 'Aloha' to any extent whatever for any and all loss, destruction, damage and injury caused by and resulting from the occurrence aforesaid or other casualties of said voyage."

He also alleged that his vessel was seaworthy, that the injury to the appellant was entirely due to his own negligence in handling the fish-lines, and that the appellant knew of the danger involved in reeling in the ground-line with fish-hooks attached, and assumed the risk of the operation in which he was engaged, and that the expedition was a joint ven-

ture. The petition did not set forth that the alleged negligence for which the appellant was seeking to hold the appellee liable in the state court, or otherwise, was without the knowledge or privity of the appellee, but, on the contrary, disclosed that the appellee, as owner, furnished the "Aloha" for this fishing expedition, and was in actual charge thereof as master at the time of the injury. While a petitioner is not required to admit the fact of negligence in his subordinates in order to secure the benefit of the law limiting the owner's liability, his petition for the limitation of such liability should at least allege sufficient facts to show that the law he invokes applies to him. The insufficiency of the petition was reasonably and appropriately brought to the attention of the Court. However, as the Court overruled these objections, and the cause proceeded to trial and judgment, we will deal with the situation as developed by the pleadings and the evidence.

If the injury occurred from negligence without the privity of knowledge of the owner of the vessel, he was entitled to limit his liability for the injury to the value of the vessel, although there was only one claimant. (46 U. S. C. A., § 183; White vs. Island Transportation Co., 233 U. S. 346; Flink vs. Paladini, 279 U. S. 59.)

Upon filing the petition the lower court enjoined further proceedings in the state court during the pendency of this matter and at the conclusion of the trial held that there was no negligence whatever on the part of the appellee or his employees, that

the "Aloha" was seaworthy and that the injury resulted from the negligence of the appellant, and that the accident was the result of the ordinary hazards of the task being performed by the appellant. Throughout the proceeding the appellant made timely objection to the jurisdiction of the court. Appellant claims that inasmuch as the owner of the vessel was in actual charge thereof at the time of the accident, had furnished the vessel for the expedition and was responsible for her seaworthiness, there was no basis for limiting the liability of the owner of the vessel because the owner was not "without knowledge or privity" of the conditions responsible for the accident. If the lower court had jurisdiction of the matter for the reason that it was a proper case for limiting the owner's liability, it could proceed in the exercise of that jurisdiction to adjudicate the merits of the action and in so doing might arrive at the conclusion that there was no liability whatever. (The Benefactor, 103 U. S. 239; The Erie Lighter, 108, 250 Fed. 490, and cases therein cited; Providence & N. Y. S. S. A. vs. Hill Mfg. Co., 109 U. S. 578, 592; Butler vs. Boston S. S. Co., 130 U. S. 527.) The trial Judge declined to pass upon the jurisdictional question except by formal order until all the evidence concerning the accident was before the court and then announced at the conclusion of the trial that he found no evidence of negligence whatever on the part of the owner or his employees. The final decree appealed from was in part as follows:

"1. That the accident described in the libel and petition herein and the loss, destruction, damage and injury arising therefrom, was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner.

"2. That the said petitioner be, and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from or growing out of the said occurrence happening on board said vessel, 'Aloha,' on or about said 13th day of May, 1928, and * * *

"4. That claimant's exceptions to the petition grounded upon alleged want of facts and alleged want of jurisdiction filed herein on the 22nd day of January, 1929, be and each of said exceptions is hereby overruled."

The appellant having elected to pursue his common-law remedy in the state court, the jurisdiction of the admiralty court depended upon the right of the owner to limit his liability to the value of the ship and cargo. (Section 4283 Rev. Stat.; Comp. Stat. 8021; 46 U. S. C. A., Section 183). That right in the case at bar was dependent upon the question as to whether or not the negligence upon which the appellant's claim is predicated was without the knowledge or privity of the owner of the vessel. This question is in a measure independent of the question of whether or not in fact there was negligence and of the affirmative defenses thereto, and must therefore depend on the nature

of the negligence alleged by the injured party as a basis for his recovery, and on the relation of the owner thereto. That question we will now consider.

In the case at bar the claim of the appellant is based upon the fact that the metal chain plates of the "Aloha" to which the backstays were attached extending from the rail downward for about two feet, were not flush with the side of the vessel, and were not covered by a metal plate, and that therefore the hooks were liable to momentarily catch in the side of the metal chain plates and be snapped loose by the pull of the winch. The defect, if it was a defect, was perfectly obvious to the owner and to the crew. Its proximity to the roller on the rail of the ship over which the ground-line was being drawn to the winch was obvious. It appears from the evidence not only that the owner of the vessel was on duty in the pilot-house but also that he had directed the appellant to tend the ground-line as it came over the side of the vessel and had observed him in that work. Whether the hook which injured the appellant's eye actually caught on the chain plate, or whether it caught in the soft wood of the ship's side is a matter of inference to be drawn from the evidence. The appellee contended, and the Court found, that the risks, such as they were, were obvious and were assumed by the appellant. They were, of course, as obvious to the owner as to the appellant. If, as a matter of fact, the vessel was unseaworthy for the purpose for which it was being used by reason of the failure to cover the chain plates with sheet metal so as to

diminish the chance that the hooks would catch while coming aboard, the owner of the vessel who had prepared it for the service and who was fully advised, by reason of his long experience, as to the character of the operations to be performed and as to the dangers thereof, was necessarily in privity with and had knowledge of the conditions.

The only persons involved in the accident to the appellant were the owner and master of the vessel who furnished the appliances and who controlled the vessel at the time of the accident, and the appellant himself who was operating the instrumentalities by which he was injured. Under these conditions, if the owner was liable to the extent of the value of the vessel, he was also liable for the entire damage suffered by the appellant. It is argued in the briefs and suggested in the testimony that there may have been some negligence in the manner in which the vessel was placed with reference to the ground-line which was being brought aboard. It is suggested that the ground-line, as it came aboard, was tending too far forward and therefore the hooks were more likely to catch as they came aboard. The claim of the appellant filed herein, however, is not predicated upon any negligence of that kind, nor does it appear from the record that any such claim was made in the Superior Court. We therefore do not further consider such claim. There is, therefore, no basis for the limitation of the liability of the owner upon a claim of negligence based upon the failure to cover the chain plates with sheet metal because of his ignorance,

for he had full knowledge thereof. That being true the Court had no jurisdiction to proceed and pass upon the merits of the case or to determine whether or not such failure was negligence, in the absence of the consent of the injured party, who had elected to bring his action at law in the Superior Court of the State of Washington and who made timely objection to the trial of the question of negligence, contributory negligence and assumed risk, and other defenses. The objection of the appellant to the jurisdiction of the court should have been sustained and the Court should have declined to pass upon the merits of the appellant's claim. Upon ascertaining that the owner was charged with knowledge and privity the proceedings should have been dismissed for lack of jurisdiction and the appellant allowed to proceed in the state court. (Weishaar vs. Kimball S. S. Co., 128 Fed. 397.)

Ordinarily, no doubt, the logical method of procedure in the trial court would be to first determine whether there was negligence and then to determine whether or not the owner was personally responsible therefor beyond the value of the vessel because of his knowledge or privity thereof or thereto. (Providence & N. Y. S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578, 595), but where it is apparent from the allegations of the pleadings as in this case, or from the evidence, that the owner has no right to limit his liability, where the jurisdiction of the Court is challenged by the claimant, the judgment should go no further than to dismiss the case for lack of jurisdiction without prejudice to the parties to litigate

the question of negligence, and of liability before jury, as authorized by law. (46 U. S. C. A., § 688; 28 U. S. C. A., § 41, subd. 3, and § 371; Engel vs. Danvenport, 271 U. S. 33.) The findings of the trial court should be that plaintiff had knowledge of the condition of the ship as to seaworthiness so far as that question is involved in this action and that he is therefore not entitled to maintain the proceeding for the limitation of his liability.

The Circuit Court of the Second Circuit, in "The 84–H," Appeal of Bouker Contracting Co., 296 Fed. 427, a similar case, reversed a judgment dismissing proceedings and vacating an injunction staying the proceedings in a state court, and held that the District Court should have entered a decree exempting the petitioner from all liability and permanently enjoining the claimant from proceeding in the state court. That court distinguished the case of Weisshaar vs. Kimball S. S. Co., 128 Fed. 397 and Parsons vs. Empire Transportation, 111 Fed. 202, decided by this court, and the case of The Republic, 61 Fed. 109, also by that court, and the case of Quinlan vs. Pew et al., 56 Fed. 111, by the Circuit Court of Appeals of the First Circuit, upon the ground that "where there is no negligence and no fault, privity is a matter of no consequence." While this statement is entirely correct the difficulty presented by these cases arises from the concurrent jurisdiction in the state court, the District Court as a common-law court and the same, or another, District Court sitting in admiralty, to pass upon the claim of negligence. The Judiciary Act of 1789

(§3) conferring jurisdiction upon the district courts in admiralty and maritime matters, preserved to suitors their rights at common law where the common law was competent to give it. These exceptions in favor of the common-law rights have been maintained to the present time. (28 U. S. C. A., § 41, subd. 3, and § 371, subd. 3.) The rights of seamen to recovery for injuries suffered originally defined by the common law (The Osceola, 189 U. S. 158; Chelentis vs. Luckenbach, 247 U. S. 372; Carlisle vs. Sandanger, 259 U. S. 255) have been extended by amendment to the Merchant Marine Act to conform to the Federal Employers Liability Act. (Panama R. R. Co. vs. Johnson, 264 U. S. 375; Baltimore S. S. Co. vs. Phillips, 274 U. S. 316; 46 U. S. C. A., § 688.) By these amendments the injured seaman is given the right to elect whether he shall proceed at common law before a jury or in admiralty. (Panama R. R. Co. vs. Johnson, *supra.*) One of the most important distinctions, if not the most important, between the right of the injured party to assert his claims in admiralty and at common law is the right to a trial by jury, and the effect of this legislation is to give the injured party a right to the determination of the question of negligence by a jury instead of by an admiralty court, if he so elects. The appellant, by bringing an action in the state court, made the election which the statute authorized him to make. Unless we are prepared to hold that the mere allegation by the owner of the vessel that he was without privity and knowledge of the negligence or the accident conferred upon the

admiralty court jurisdiction to determine the question of negligence regardless of privity or knowledge, and that thus to hold that the owner, by an untrue allegation, conferred jurisdiction on a court, where such jurisdiction would not otherwise exist; and that the practical effect of such an untrue allegation is to deprive the claimant of his right to a trial by jury, we must hold that the proper order of the trial court upon discovering that there was both privity and knowledge on the part of the owner would have been a dismissal of the case.

The opinion of the Supreme Court of the United States delivered by Chief Justice Taft in Hartford Accident Co. vs. Sou. Pac., 273 U. S. 207, apparently was relied upon by the lower court in the procedure and disposition made of this case. That case follows Providence S. S. Co. vs. Hill, 109 U. S. 578, *supra*, with relation to the order of proof, as follows:

> " * * * it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants."

The question under consideration by the Supreme Court in Hartford Accident Co. vs. Sou. Pacific, *supra*, was whether after the determination by the trial court that the injury arose with the knowledge and privity of the owner, and that consequently it was not a proper case for the limitation of the ship

owner's liability to the value of the ship, it was the duty of the Court to grant the petitioner's motion to dismiss the petition for lack of jurisdiction to proceed further notwithstanding the opposition of the claimants to such dismissal, and their desire to have the merits of their claims adjudicated in the admiralty court; or whether the Court, notwithstanding its finding that the accident was with the privity and knowledge of the owner, and notwithstanding the motion of the petitioner to dismiss his petition, should proceed to determine the merits of the controversy. It was held that the court under such circumstances should retain jurisdiction of the case and adjudicate the validity of the claims. The difference between that case and the case at bar is that the Supreme Court was there considering a case in which the claimants invoked the jurisdiction of the Court to adjudicate their claims in the admiralty court after they had been brought into that court at the instance of the ship owners, while in the case at bar the claimant is objecting to the jurisdiction of the admiralty court and insisting upon his right to proceed at law. Inasmuch as the right to determine whether or not the claimant's rights should be adjudicated in admiralty or at common law lies with the claimant (Plamals vs. S. S. "Pinar Del Rio," etc., 277 U. S. 151), and not with the Court, the decision in Hartford Accident Co. vs. Sou. Pacific is not at variance with the view that we take concerning the rights of the appellant.

The case is remanded to the trial court with directions to dismiss the case for want of jurisdic-

tion to limit appellee's liability, without determination of the question of negligence of appellee or appellant and without passing upon the affirmative defenses to the claim of negligence advanced herein by the appellee.

[Endorsed]: Opinion. Filed Oct. 21, 1929. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5877.

WINFIELD A. GREEN, Claimant of the Diesel Halibut Vessel "ALOHA," Her Engines, etc.,

Appellant,

vs.

AXEL LANGNES, Owner,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause

be, and hereby is, remanded to the said District Court with directions to dismiss the case for want of jurisdiction to limit appellee's liability, without determination of the question of negligence of appellee or appellant and without passing upon the affirmative defenses to the claim of negligence advanced herein by the appellee, with costs in favor of the appellant and against the appellee.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellee for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Oct. 21, 1929. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the seventeenth day of December, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING, ETC.

Upon consideration thereof, and by direction of the Honorable Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, and Harold Louderback, District Judge, before whom the cause was heard, IT IS ORDERED that the petition, filed November 20, 1929, on behalf of appellee for a rehearing of above cause be, and hereby is denied.

IT IS FURTHER ORDERED, that the issuance, under Rule 32, of the mandate of this court in above cause be, and hereby is stayed to and including January 13, 1930, and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Bronson, Jones & Bronson, proctors for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court

in the above cause be, and hereby is stayed to and including January 31, 1930; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, January 2, 1930.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and eighty-nine (189) pages, numbered from and including 1 to and including 189, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of proctors for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of January, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 12, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,748. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 617. Axel Langnes, Owner of the Diesel Halibut Vessel "Aloha," Her Engines, etc., petitioner, vs. Winfield A. Green, claimant. Petition for writ of certiorari and exhibit thereto. Filed February 1, 1930. File No. 34,748.

FILE COPY

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CHARLES

In the Supreme Court
OF THE
United States

October Term, 1929.

No. #38

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner.

vs.

WINFIELD A. GREEN, Claimant.

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

IRA BRONSON,
H. B. JONES,
ROBERT BRONSON,
614-620 Colman Bldg.,
Seattle, Washington.
Proctors for Petitioner.

SAMUEL B. BASSETT,
511 Alaska Bldg.,
Seattle, Washington.

and

WINTER S. MARTIN,
2014-2016 Smith Tower,
Seattle, Washington.
Proctors for Respondent.

MARTIN & DICKSON, PRINTERS

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IN THE

Supreme Court of the United States

October Term, 1929.

No.

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner.

vs.

WINFIELD A. GREEN, Claimant,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

The petition of Axel Langnes, owner of the diesel halibut vessel "ALOHA," an American fishing vessel, for a writ of certiorari directed to the Honorable the United States Court of Appeals for the Ninth Judicial Circuit, in a cause therein pending, civil and maritime, upon a petition of said Axel Langnes, as owner of said vessel, for exemption from or limitation of liability under Revised Statutes of the United States, 4282, 4283, 4284, and 4285, and Statutes of the United States amendatory thereof and supplemental thereto, and Admiralty Rules 51, 52, 53, 54 and 55, respectfully shows to the court:

STATEMENT OF MATTERS INVOLVED

1. From the evidence it is disclosed that your petitioner, Axel Langnes, is the sole owner of the American diesel halibut vessel "ALOHA," a vessel 56 feet in length, built and used for the halibut fishery, (Apostles, page 49) that said vessel, having a capacity of 28 gross and 19 net tons, was licensed in the fishing trade under the laws of the United States. (Apostles, page 50.) That your petitioner, the owner of said vessel, and respondent, Winfield A. Green, and certain other fishermen entered into an oral agreement for a venture in halibut fishing out of the port of Seattle, Western District of Washington, Northern Division, prior to May 13, 1927, under the provisions of which agreement your petitioner, as the owner of said vessel, was to act as master and respondent, Green, was to act as engineer and fisherman, and other persons were to act as fishermen and in other capacities on board said vessel. (Apostles, page 51.) The fishing was done on the basis of "lays"—that is to say, the fishermen, including respondent, did not sign articles, but performed their services upon the contingency of receiving a share of the net earnings of the vessel upon the following basis: The proceeds of the venture were to be divided, first, one-fifth of the gross earnings to the vessel, second, after the deduction of all expenses, the balance of the proceeds to be divided equally between your petitioner, as the owner and master, and the other fishermen, including respondent Green. (Apostles, pages 52, 53.)

2. The vessel was built at Seattle, Washington, in the year 1924, and during the voyage in question was identically as built in construction, design and structural equipment. (Apostles, pages 56, 57.) At the time of commencing the voyage in question and at all times up to the time of the injury of the respondent, the vessel was in all respects seaworthy, efficiently manned, equipped, furnished and fitted with suitable machinery, tackle, apparel and appliances in the usual and customary manner for vessels of her type and trade. (Apostles, pages 57.)

3. The respondent, Winfield A. Green, had been engaged as a fisherman on vessels of the same type and construction and was experienced in the duties required of a fisherman, having followed that calling all his life. (Apostles, page 68.)

4. On May 8, 1927, the vessel sailed from Seattle for the halibut banks East of Cape St. James, Queen Charlotte Islands, in the Gulf of Alaska, where, on the 13th day of May, 1927, the respondent was injured by being struck and hooked through the eye with a new halibut hook on a new halibut line while tending the ground line, which was then being hauled aboard the vessel by means of a power capstan or gurdy. (Apostles, pages 70, 76, 77, 78.)

5. Fishing for halibut was done by means of a long ground line, about 1,800 feet in length, to which were at-

tached gangions or leaders 52 inches long and placed at intervals of 13 feet along the ground line; to the end of the gangions halibut hooks were attached and this line was lowered over the side and stretched along the bottom of the ocean. Subsequently, one end of the ground line was taken aboard the vessel, passed through or around the capstan or gurdy, and the ground line was hauled aboard the vessel over a roller placed on the ship's side by means of power applied to the capstan. (Apostles, pages 69-71.)

6. On May 13, 1927, while so taking in the ground line off Cape St. James, the respondent, Green, was situated in the waist at the rail adjacent to the roller for the purpose of tending the ground line, freeing the gangions if they became tangled or hooked and fouled upon any object and removing the fish which had been caught. The winch was controlled by levers, one of which was placed at the rail within reach of and for use and operation by the fishermen in respondent's position, so that the operation of the winch and the operation of the ground line could be stopped and started as occasion required. (Apostles, pages 70, 90, 91, 94, 95, 96.)

7. Previous to the date in question, the respondent and the other fishermen on the vessel had been instructed by the master, your petitioner, in the usual and customary manner of handling this ground line and in starting and stopping of the capstan, and your petitioner had instructed

that the usual and safe method of tending the ground line was by the use of both hands, and that if the hooks caught in the ground line or elsewhere and became entangled, to move the lever and stop the winch and gangions until the hook was disentangled. Nevertheless, in disregard of these instructions, the respondent used only one hand in tending the ground line and refrained from stopping the capstan when the hooks became caught or entangled, as they frequently and customarily did, and allowed the hooks to be pulled or torn loose by the power of the capstan. One of the hooks caught on some object on or about the vessel or ground line, the evidence failing to disclose where or upon what, and the gangion, drawn taut by the moving capstan, snapped in-board and struck the claimant in the eye, causing serious injury. When asked whether he could have moved the lever and stopped the winch, as instructed, the respondent testified that he thought he could, that the gangions would stretch quite a little and that he could have moved the lever if he had attempted to do so, but did not do so. (Apostles, pages 76-99.)

8. At the time of the accident the petitioner was on board, as owner and master, performing his duties in the pilot house, and, chancing to be looking out of a window, was an eye witness to the accident. (Apostles, page 63.)

9. The evidence discloses that it was a common, usual and unavoidable occurrence, with which respondent and

the other fishermen on the vessel were experienced, for hooks to become entangled and to catch on all parts of the vessel, rigging and equipment, including the decks and clothing of the fishermen, while tending the ground line. (Apostles, pages 76, 90, 91, 93, 95, 96, 97, 107, 113, 115, 116, 119, 120, 121, 124, 126, 127, 128, 129, 137.)

10. Following the accident, respondent instituted suit in the Superior Court of the State of Washington, seeking to recover $25,000.00 damages, and made application for a jury trial. Prior to the trial of said action, your petitioner filed a petition in the District Court of the United States for the Western District of Washington, Northern Division, seeking exemption from or limitation of liability; stipulation for value of the vessel and her pending earnings at the close of the voyage in the sum of $5,000.00 was filed and the further prosecution of respondent's suit in the State Court was enjoined. (Apostles, page 13.)

11. The respondent filed claim and answered in the limitation proceeding, contesting both petitioner's right to exemption and his right to limitation of liability, alleging that the vessel was unseaworthy as built, in that the metal chain plates at the vessel's side were not covered with sheet metal; that the roller was placed too close to the chain plates and that the vessel was unseaworthy in these respects. (Apostles, pages 15, 37.)

12. The respondent excepted to the petition, contending that the court was without jurisdiction to determine the cause upon the ground that but one claim was presented and that since the owner was on board as master he must have been privy to and had knowledge of any unseaworthiness which existed, and was, therefore, not entitled to maintain the proceeding.

13. The District Court overruled the exceptions and the cause proceeded to trial on the 22nd day of January, 1929, before Honorable Jeremiah Neterer, Judge.

14. The petitioner put in his opening evidence to establish the prima facie case, at the close thereof proctor for petitioner stating as follows:

> "MR. BRONSON: I think the petitioner will rest on the question of limitation at this time. I suppose it will be in order for us to proceed in the customary manner and rebut claimant's proof as to liability."

and this procedure was approved by the court. (Apostles, page 57.)

15. Thereupon respondent, Green, undertook to establish his claim, and, at the close of claimant's evidence, the following proceedings were had:

> "MR. BASSETT: (Prosecutor for Claimant), I think that is all. We rest at this time.
>
> THE COURT: Is there anything?
>
> MR. BRONSON: At this time, the petitioner challenges the sufficiency of the evidence of the claimant on the question of total exemption.

THE COURT: What have you to say about that?

MR. BASSETT: I have a motion to make on my own behalf.

THE COURT: Make your motion.

MR. BASSETT: At this time I renew the motion I made at the close of—at the beginning of the case, and at the close of Mr. Langnes' testimony on the question of the right to limit liability in this case.

THE COURT: What have you to say about Mr. Bronson's motion. If his motion is well taken, then your motion is superfluous.

(Argument of counsel.)

THE COURT: The first thing for the Court to determine is whether there is any liability; and if there is any liability, then may it be limited? That is the order in which the Supreme Court has very recently stated the case must be disposed of. Now, I will hear both of you gentlemen on the respective motions. I would rather hear from Mr. Bassett whether any negligence is shown upon the part of the owner.

(Argument of counsel, with citation of authority.)

THE COURT: * * * To consider this case in its broadest aspect, that, as between employer and employee, the primary relation carries with it certain obligations: That the employer must furnish the employee a reasonably safe place within which to work; while the employee assumes all of the hazards that are either known to him, or open and obvious, or suggestive of danger.

Now, in this case, we have the testimony of the claimant himself; in fact, there is not much dispute in the evidence here. * * *

Now, this ground-line had to be drawn into the boat, and the gangions had to be disentangled from the

ground-line; and that was the business of the men employed for that purpose. They were instructed by the owner how that should be done.

The claimant in this case has been a fisherman for many years, and he knew how those things were done, and what was required to be done, and, as he says himself, as this went along, he saw how these hooks were catching, and that sometimes they caught, or stopped by catching, and it was necessary to stop the winch; and when asked whether he could have moved the lever, he said he thought he could, because the gangions stretched quite a little and that he could have moved the lever if he thought it was necessary to do it. * * *

There is nothing here in the evidence at all that would indicate that Langnes was in any way negligent in the performance of any duties required to be done by him, or the omission to do anything that he should have been required to do. Why, if this case was tried in any court, I don't care where, either state or federal court, why, you would not—it never would get anywhere; and for this Court to hold that, why, it would be absolutely wrong, and in violation of every rule of negligence known to me; and I have tried a good many negligent cases.

So that the motion of the owner must be sustained. There is no negligence that has been established in this case upon the part of the owner; and no negligence having been established, why, of course, limitation is not necessary, because there is no liability; and that will be the ruling of the Court, that the motion will be granted and the claim dismissed." (Apostles, pages 138-142.)

"THE COURT: * * * I should probably state there is not anything shown in this case that there was anything about the boat that was in any way dangerous, or out of harmony with the usual construction and the

mere fact that the owner afterwards put on sheet iron on a part of it, that is no evidence of negligence, no matter what time this was performed."
(Apostles, page 143.)

16. Thereafter, on the 25th day of January, 1929, the Court entered a written memorandum decision, (Reported as the "ALOHA," 1929 A. M. C., 320, 32 Fed. (2nd) 284.) finding, among other things:

"The vessel was in all respects seaworthy, efficiently manned, equipped, furnished and fitted with suitable machinery, tackle, apparel, appliances, etc., in customary manner, suitable for the venture. The claimant had been engaged as a fisherman for many years; that all of the fishermen on the said vessel were instructed by the master, petitioner, the usual and customary manner of operation of the ground-line. * * * The fisherman was required to operate the winch and to disentangle the gangions from the ground-line, and if halibut were hooked to detach them and put them in the boat. Such was the duty of the claimant at the time of his injury, and he was instructed by the owner that the usual method of doing it was by the use of both hands, and if the hooks caught in the ground-line or elsewhere and became entangled, to move the lever and stop the winch until the gangion and the hook were disentangled. One of the hooks hooked on some object on or about the vessel or ground-line, and the gangion, drawn taut by the moving winch, snapped and struck claimant in the eye, causing serious injury. When asked whether he could have moved the lever and stopped the winch, the claimant said he thought he could, that the gangions would stretch quite a little and that he could have moved the lever if he had attempted to do so, but did not do so. All of the dangers were known to the claimant; they were open and obvious; they were the usual and ordinary hazards necessarily attendant upon the undertaking.

The vessel thus equipped had been engaged in fishing for some years, and its construction was in the usual, customary fashion."

(Apostles, pages 145, 156.)

17. Thereafter, on the 4th day of March, 1929, a final decree conforming to the court's decision was entered, among other things, the court decreeing:

(1) That the accident described in the libel and petition herein, and the loss, destruction, damage and injury arising therefrom, was not caused by the design or the neglect of the petitioner, Axel Langnes, and did not occur with the privity knowledge of said petitioner.

(2) That the said petitioner be, and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from, or growing out of the said occurrence happening on board said vessel "Aloha," on or about the 13th day of May, 1928.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT ON APPEAL

18. Following the decree of the District Court, claimant, respondent Green, duly appealed from the above mentioned decree to the United States Circuit Court of Appeals, Ninth Circuit. The matter came on duly for argument before Honorable Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, and Harold Lauderback, District Judge, at

the September term, Seattle, on the 17th day of September, 1929.

On the 21st day of October, 1929, the Honorable Circuit Court of Appeals filed its decision herein. (Apostles, p. 174) and (Reported as the "ALOHA," 1929 A. M. C. 1642.) wherein it was held in part as follows:

> "The appellee alleges in his libel,
>
> "'that petitioner desires to claim the benefits of sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, and in this proceeding by reason of the facts and circumstances hereinbefore set forth, petitioner further desires to test its liability and the liability of said M. S. 'Aloha' to any extent whatever for any and all loss, destruction, damage and injury caused by and resulting from the occurrence aforesaid or other casualties of said voyage'."

"He also alleged that his vessel was seaworthy, that the injury to the appellant was entirely due to his own negligence in handling the fish-lines, and that the appellant knew of the danger involved in reeling in the ground-line with fish-hooks attached, and assumed the risk of the operation in which he was engaged, and that the expedition was a joint venture. (Apostles, p. 175.)

* * * * * Appellant (respondent Green) claims that inasmuch as the owner of the vessel was in actual charge thereof at the time of the accident, had furnished the vessel for the expedition and was responsible for her seaworthiness, there was no basis for limiting the liability of the owner of the vessel because the owner was not 'without knowledge or privity' of the conditions responsible for the accident. (Apostles, p. 177.) * * * * *

The appellant having elected to pursue his common-law remedy in the state court, the jurisdiction of the admiralty court depended upon the right of the owner to limit his liability to the value of the ship and cargo. (Section 4283 Rev. Stat.; Comp. Stat. 8021; 46 U. S. C. A., Section 183.) That right in the case at bar was dependent upon the question as to whether or not the negligence upon which the appellant's claim is predicated was without the knowledge or privity of the owner of the vessel. This question is in a measure independent of the question of whether or not there was negligence and of the affirmative defenses thereto, and must therefore depend on the nature of the negligence alleged by the injured party as a basis for his recovery and on the relation of the owner thereto. That question we will now consider. (Apostles, p. 179.) In the case at bar the claim of the appellant is based upon the fact that the metal chain plates of the 'Aloha' to which the backstays were attached extending from the rail downward for about two feet, were not flush with the side of the vessel, and were not covered by a metal plate, and that therefore the hooks were liable to momentarily catch in the side of the metal chain plates and be snapped loose by the pull of the winch. The defect, if it was a defect, was perfectly obvious to the owner and to the crew. Its proximity to the roller on the rail of the shop over which the ground-line was being drawn to the winch was obvious. It appears from the evidence not only that the owner of the vessel was on duty in the pilot-house but also that he had directed the appellant to tend the ground-line as it came over the side of the vessel and had observed him in that work. Whether the hook which injured the appellant's eye actually caught on the chain plate, or whether it caught in the soft wood of the ship's side is a matter of inference to be drawn from the evidence. The appellee contended, and the Court found, that the risks, such as they were, were obvious and were assumed by the appellant. They were, of course, as obvious to the owner as to the

appellant. If, as a matter of fact, the vessel was unseaworthy for the purpose for which it was being used by reason of the failure to cover the chain plates with sheet metal so as to diminish the chance that the hooks would catch while coming aboard, the owner of the vessel who had prepared it for the service and who was fully advised, by reason of his long experience, as to the character of the operations to be performed and as to the dangers thereof, was necessarily in privity with and had knowledge of the conditions. The only persons involved in the accident to the appellant were the owner and master of the vessel who furnished the appliances and who controlled the vessel at the time of the accident, and the appellant himself who was operating the instrumentalities by which he was injured. Under these conditions, if the owner was liable to the extent of the value of the vessel, he was also liable for the entire damage suffered by the appellant. * * * * * There is, therefore, no basis for the limitation of the liability of the owner upon a claim of negligence based upon the failure to cover the chain plates with sheet metal because of his ignorance, for he had full knowledge thereof. That being true the Court had no jurisdiction to proceed and pass upon the merits of the case or to determine whether or not such failure was negligence, in the absence of the consent of the injured party, who had elected to bring his action at law in the Superior Court of the State of Washington and who made timely objection to the trial of the question of negligence, contributory negligence and assumed risk, and other defenses. The objection of the appellant to the jurisdiction of the court should have been sustained and the Court should have declined to pass upon the merits of the appellant's claim. Upon ascertaining that the owner was charged with knowledge and privity the proceedings should have been dismissed for lack of jurisdiction and the appellant allowed to proceed in the state court. (Apostles, p. 178 to 181.)

* * * * * The rights of seamen to recovery for injuries suffered originally defined by the common law (*The Osceola*, 189 U. S. 158; *Chelentis vs. Luckenbach*, 247 U. S. 372; *Carlisle vs. Sondanger*, 259 U. S. 255) have been extended by amendment to the Merchant Marine Act to conform to the Federal Employers Liability Act. (*Panama R. R. Co. vs. Johnson*, 264 U. S. 375; *Baltimore S. S. Co. vs. Phillips*, 274 U. S. 316; 46 U. S. C. A. Sec 688.) By these amendments the injured seaman is given the right to elect whether he shall proceed at common law before a jury or in admiralty. (*Panama R. R. Co. vs. Johnson, supra.*) One of the most important distinctions, if not the most important, between the right of the injured party to assert his claims in admiralty and at common law is the right to a trial by jury, and the effect of this legislation is to give the injured party a right to the determination of the question of negligence by a jury instead of by an admiralty court, if he so elects. The appellant, by bringing an action in the state court, made the election which the statute authorized him to made. (Apostles, p. 183.)

* * * * * The case is remanded to the trial court with directions to dismiss the case for want of jurisdiction to limit appellee's liability, without determination of the question of negligence of appellee or appellant and without passing upon the affirmative defenses to the claim of negligence advanced herein by the appellee." (Apostles, p. 185.)

10. Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

(a) The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals on the same matter, and decides a Federal question in a way

in conflict with applicable decisions of this court, in that notwithstanding the District Court, who tried the cause, found and decreed that petitioner's vessel was in all respects seaworthy and properly and sufficiently equipped in all respects according to the usual and customary standards of the trade, that no negligence was proved to have existed upon the part of your petitioner in any wise contributing to the injuries and loss of claimant, and that the accident was solely and proximately caused by the willful negligence and carelessness of claimant in refusing and neglecting to follow instructions and use safety devices of the vessel supplied on board and in good order by the petitioner, and notwithstanding that the Circuit Court of Appeals made no findings and drew no conclusions to the contrary, and expressly declined to pass upon the question of seaworthiness or the negligence, if any, of your petitioner, nevertheless, the Circuit Court of Appeals holds that the District Court was without jurisdiction to hear and determine the cause on the merits, and should have dismissed the proceedings because the claimant merely alleged and contended before the State Court, and in this proceeding without substantiation of any proper proof thereon, that the vessel, in the same condition as when built, was unseaworthy in not having her chain plates covered with sheet metal.

The evidence without contradiction, being the evidence of the claimant, discloses that the chain plates and the con-

dition as to covering or absence of covering, first, was the usual, customary and standard construction and condition for vessels of her type and trade, and, second, the evidence wholly failed to show that the vessel's chain plates or her metal sheathing had any proximate connection with the accident to the claimant, claimant testifying that he did not see where the hook caught; no other witness testifying upon the subject. The decisions of the Circuit Court of Appeals, in substance on this point, is that, since the owner was on board as master, the District Court, without the taking of testimony on the question of negligence, should have held that the court was without jurisdiction to pass upon the merits of the case, and should first determine and decide the question of theoretical privity and knowledge upon the assumption that if petitioner should happed to have been negligent, or if the vessel should have happened to have been unseaworthy pursuant to claimant's unsupported contentions, the petitioner would have been privy to, and had known of the accident within the meaning of the Statute, and hence would not have been entitled to maintain the proceeding.

This is in conflict with the decisions of this court in the following cases:

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612.

The Benefactor, 102 U. S. 214; 26 L. Ed. 157;

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

La Bourgogne, 210 U. S. 95; 28 S. Ct. 664; 52 L. Ed. 973;

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 27 L. Ed. 1038;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Capitol Transportation Co. vs. Cambria Steel Co.,

The Benjamin Noble, 39 S. Ct. 292; 249 U. S. 334; 63 L. Ed. 631.

This decision is also in direct conflict with the decisions of several of the Circuit Courts of Appeals, as follows:

The 84-H, Appeal of Bouker Contracting Co. (C. C. A 2nd C), 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A. 4th C.), 285 Fed. 7;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A. 4th C.), 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Nemours & Co. (C. C. A. 2nd C.), 19 Fed. (2nd) 354;

The Republic (C. C. A. 2nd C.), 61 Fed. 109;

The City of Camden (C. C. A. 3rd C.), 292 Fed. 97;

Quinlan vs. Pew (C. C. A. 1st C.), 56 Fed. 111

See also the following District Court decisions:

The Princess Sophio, 278 Fed. 180;

The Llewellyn J. Morse,—"Old Ironsides," 25 Fed. (2nd) 973.

(b) The Circuit Court held that solely by reason of the fact that the owner went to sea with his vessel as master,

and chanced to be an eye witness to the accident to claimant, under such circumstances, if the owner was liable to the extent of the value of the vessel, he must necessarily also be liable for the entire damage suffered by the claimant, the issue of unseaworthiness and negligence having been determined in the petitioner's favor by the trial court, upon the evidence produced by the claimant.

The petitioner in this case did not put in his evidence with reference to negligence and privity and knowledge in answer to the claimant's evidence for the case was brought to a close before the petitioner undertook to put in his evidence on these points. At the close of the claimant's case, following the petitioner's prima facie opening, the District Court sustained the petitioner's challenge to the sufficiency of the claimant's case and, therefore, none of the petitioner's evidence on the question of privity and knowledge, as well as negligence, is before the court. The petitioner was prepared to show the following facts which do not show in the record as it stands because the petitioner did not have his day in court, viz: that there are between three hundred and five hundred vessels, comprising substantially all of the American halibut fleet, similar to the "Aloha," having the same or similar design and construction with reference to back-stays and sheet metal covering as the petitioner's vessel; that this type of construction, including the sheet metal covering over the chain plates, is not only the usual and cus-

tomary construction for such vessels, but that petitioner, who was neither a naval architect nor a ship-builder, had exercised due care and caution in having his vessel designed for him by a competent naval architect and built by a competent ship-builder, and that, therefore, even if the court should have found that she was in fact unseaworthy as to the claimant, nevertheless petitioner was without knowledge and privity thereto within the meaning of the limitation of liability statute, and hence, in this case, the petitioner was not necessarily chargeable with knowledge and privity to the extent that he must necessarily have been liable for the entire damage to claimant, if liable at all, even if negligence were found to exist.

This decision of the Circuit Court of Appeals is in conflict with the following decisions of this Honorable Court and of the Courts of the Circuit Courts of Appeals and District Court, which have held, as the established rule, that if the owner has used due care and diligence in selecting skilled and competent experts in the repair or construction of his or its vessel, the owner will be entitled to limit his liability for the negligence of such agents, viz:

The Henrieta, 1929 A. M. C. 327.

Craig vs. Continental Ins. Co., 12 S. Ct. 97; 141 U. S. 638; 35 L. Ed. 886;

Butler vs. Hines, 278 Fed. 877 (C. C. A. 1921) Certiorari denied, 42 S. Ct. 185; 257 U. S. 659; 66 L. Ed. 421;

The Tommy, 151 Fed. 570; 81 C. C. A. 50;

The Annie Faxon, 75 Fed. 312; 21 C. C. A. 366;

The City of Camden (C. C. A. 1920) 269 Fed. 334;

The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A., 56.

The 84-H, Appeal of Bouker Contracting Co. (C. C. A. 2nd C.), 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A. 4th C.), 285 Fed. 7.

The above decision is also at variance with the previously settled rule on the same point in the Ninth Circuit, viz:

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1926 A. M. C. 1657, 15 Fed. (2nd) 166.

The decision of the Circuit Court of Appeals on this point is also in conflict with the weight of authority of the decisions of the District Courts, viz:

The Princess Sophia, 278 Fed. 180;

The Erie Lighter, No. 108, 250 Fed. 490;

The Muriel, 1928 A. M. C. 1005, 25 Fed. (2nd) 505;

The Commonwealth, 1929 A. M. C. 487, 31 Fed. (2nd) 142.

The Alola (D. C. Va. 1915) 288 Fed. 1006;

Van Eyken vs. Erie R. R. Co. (D. C. N. Y. 1902) 117 Fed. 712.

(c) The Circuit Court of Appeals holds, in its decision, that if the vessel should have been held unseaworthy, which

it was not, and if the petitioner should have been held negligent, which he was not, and hence should have been not entitled to limit his liability, that the District Court would have been, and hence, in any event, must be, without jurisdiction to retain the cause and decree full recovery to the exclusion of the pending proceeding in the State Court. The existing decisions express doubt and uncertainty as to whether or not the Admiralty Court has jurisdiction to retain a proceeding and grant full recovery to a claimant where limitation is denied, and where claimant had previously instituted suit in aonther court, viz:

> *In re The Titanic—Oceanic Steam Navigation Co.—Appeal of the Long Island Loan & Trust Co.*, 204 Fed. 295;
>
> Affirmed in principal, same case, 204 Fed. 260;
>
> *Huasteca Petroleum Co. vs. Cia de Navagacao Lloyd Brasileiro* (D. C. N. Y. 1924) 297 Fed. 318, 326.

The law on this point seems to have been definitely settled by this court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612, and the decision of the Circuit Court of Appeals is squarely in conflict therewith.

The decision of the Circuit Court of Appeals is also in conflict with the decision of the District Court for the Southern District of New York, 1928.

> *The Linseed King—Petition of Spencer Kellogg & Sons Inc.*, 24 Fed. (2nd) 967.

The law on this point was held still uncertain notwithstanding the decision of this court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra,* by the District Court, Southern District of New York (1927), *in re Atlantic Gulf & West Indies S. S. Lines,* 20 Fed. (2nd) 975, and it appears, therefore, that the decision of the Circuit Court of Appeals upon this important question of general law is in a manner apparently untenable and in conflict with the weight of authority, and if the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra,* is not controlling, then the point has not been but should be settled by this court.

(d) In its decision, the Circuit Court of Appeals holds that the jurisdiction of the Admiralty Court for personal injury to a seaman, under a petition for limitation of liability by the owner, is dependent upon the consent of the seaman, and cannot be sustained if the seaman elects to bring his action before a jury in a common law court. This is in direct conflict with decisions of this court, the Circuit Courts of Appeals and the District Courts of the United States, in that, *first,* the jurisdiction of the Federal Courts is limited and controlled by law and cannot be conferred by consent, and want of jurisdiction, cannot be waived, modified or affected at the discretion or election of any party, viz:

King Iron Bridge Co. vs. Otoe County, 120 U. S. 225; 30 L. Ed. 623; 7 S. Ct. 552;

New England National Bank vs. Calhoun, C. C. A. (N. M.) 9 Fed. 2nd, 272;

Highway Construction Co. vs. McClelland, C. C. A. (Mo.) 14 Fed. 2nd, 406;

Danks vs. Gordon, C. C. A. (N. Y.) 272 Fed. 821;

New York Life Ins. Co. vs. Johnson, C. C. A. (Iowa) 255 Fed 958;

Prez vs. Canadian Land & Fur Co., D. C. (La.) 14 Fed. 2nd, 181;

McLaughlin vs. Western Union Tel. Co., D. C. (La.) 7 Fed. 2nd, 177;

Rosenberg vs. Shuler, D. C. (Okl.) 289 Fed. 820.

And, *second*, the decision of the Circuit Court of Appeals, that the jurisdiction of the Admiralty Court under a petition for limitation of liability, should be dismissed for want of jurisdiction at the instance of a seaman who declares an election to prosecute his claim before a jury in a court of law, is squarely in conflict with the decision of this court in the case of

The Edward, In re East River Towing Co. Inc. (N. Y. 1924) 266 U. S., 355; 45 S. Ct. 114; 69 L. Ed. 324.

Upon the same point the decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit, viz:

In re Petition of Union Sulphur Co. (C. C. A., N. Y. 1924) 5 Fed. 2nd, 1023.

The Clarence P. Howland (C. C. A., N. Y. 1925) 6 Fed. 2nd, 791.

(e) For the further reasons advanced in the brief supporting this application, your petitioner is advised and believes that the determination of the Circuit Court of Appeals in the instant case was erroneous and in conflict with the decisions of this Honorable Court, the decisions of the various Circuit Courts of Appeals and the decisions of the various District Courts.

WHEREFORE, Your petitioner respectfully prays that a Writ of Certiorari may issue, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record of all proceedings of said court in the above entitled cause, to the end that said cause may be reviewed and determined by this court as provided by the law.

And your petitioner will ever pray.

AXEL LANGNES, *Petitioner.*

By IRA BRONSON,

State of Washington,
Western District of Washington, } *SS.*
Northern Division.

IRA BRONSON, being first duly sworn, says that he is one of the Proctors for Axel Langnes, the petitioner herein, and a member of the bar of the above entitled court, and makes this verification for and on behalf

of said petitioner for the reason that the said petitioner is not within the jurisdiction; that he has read said petition subscribed by him, and that the facts therein stated are true to the best of his knowledge and belief.

IRA BRONSON.

Subscribed and sworn to before me this 25th day of January, 1930.

E. W. PARKS,

Notary Public in and for the State of Washington, residing at Seattle.

I hereby certify that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

IRA BRONSON,

FILE COPY

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In the Supreme Court
OF THE
United States

October Term

No. 38

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN, Claimant,

Respondent.

BRIEF IN SUPPORT OF

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

IRA BRONSON,
H. B. JONES,
ROBERT BRONSON,
614-620 Colman Bldg.,
Seattle, Washington.
Proctors for Petitioner,

SAMUEL B. BASSETT,
511 Alaska Bldg.,
Seattle, Washington.
and
WINTER S. MARTIN,
2014-2016 Smith Tower,
Seattle, Washington.
Proctors for Respondent.

MARTIN & DICKSON, PRINTERS

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IN THE

Supreme Court of the United States

October Term

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN, Claimant,

Respondent.

BRIEF IN SUPPORT OF

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

STATEMENT

This cause originated by petitioner filing a petition for exemption from or limitation of liability in the United States District Court for the Western District of Washington, Northern Division, as the owner of the American diesel halibut vessel "ALOHA," Honorable Jeremiah Neterer, Judge. In said proceeding respondent appeared below as claimant, and from a final decree of the District Court, entered March 4th, 1929, (Apostles, page 148) dismissing claimant's claim and granting total exemption to petitioner,

claimant appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the Circuit Court of Appeals was rendered and filed October 21st, 1929. (Apostles, pages 174-186, reported 1929 A. M. C. 1642).

On the 21st day of October, 1929, the decree of the Circuit Court of Appeals was entered and filed, remanding the proceedings to the District Court with directions to dismiss the case for want of jurisdiction to limit petitioner's liability, without determination of the question of negligence of the petitioner, or claimant, and without passing upon petitioner's affirmative defenses, and with costs to claimant. (Apostles, pages 180-6.)

On November 20, 1929, a petition for rehearing was filed by the petitioner in the Circuit Court of Appeals, and, after consideration, said petition for rehearing was by said Circuit Court of Appeals, denied on the 2nd day of January, 1930 (Apostles, page 188).

On January 2nd, 1930, upon application of the petitioner's proctors, the Circuit Court of Appeals entered and filed an order staying mandate to and including January 31, 1930, in the event petition for writ of certiorari be made and docketed in this Court on or before said last mentioned date. (Apostles, p. 188.)

Petitioner now makes application to this Honorable Court for a writ of certiorari to be directed to said Honorable Circuit Court of Appeals for the Ninth Circuit, to the end that said cause may be reviewed and determined according to law.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, reading in part as follows:

> "Sec. 347. (Judicial Code, section 240, amended.) Certiorari to Circuit Court of Appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from Circuit Courts of Appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(b) (No State Statute being involved, this sub-section is not pertinent.)
>
> "(c) No judgment or decree of a Circuit Court of Appeals, or of the Court of Appeals of the District of Columbia, shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

STATEMENT OF FACTS

The pertinent facts of the case, stated briefly, are that petitioner was the sole owner of a diesel American halibut vessel, operating to the Alaska halibut banks from Seattle. Halibut fishing is done on the basis of "lays," according to a standard custom of the trade, on the basis of shares in the proceeds of each voyage. First, one-fifth of the gross proceeds is allowed to the vessel, as the vessel's share, then all of the expenses of the voyage are deducted, and the remainder is divided equally, share and share alike, between the Master, who is usually the owner or part owner, and all the other members of the crew. No articles are signed, and no written or oral contracts or agreements are entered into, other than the standard oral understanding as to customary division of the "lays," and the designation by the Captain of certain men to perform special duties, in addition to fishing, such as engineer, cook, etc. No person aboard is an employer, and no person aboard an employee.

On the 13th day of May, 1928, petitioner's vessel, the "ALOHA," so manned, with petitioner, the owner, aboard as Master and fisherman, and the claimant, Winfield A. Green, aboard as engineer and fisherman, was at sea, fishing for halibut off Cape St. James, Queen Charlotte Island, British Columbia.

At the time of the accident involved herein, respondent was standing at the rail, in the waist of the vessel, tending the ground line, a long line approximately 1,800 ft. in length, which is stretched along the bottom of the ocean, and to which are attached, at intervals of 13 feet, leaders or "gangions" 52 inches in length with baited halibut hooks on their extremities. After this line has remained on the ocean bottom a certain period of time, one end is taken aboard the vessel, passed around a power driven capstan or "gurdy," and the entire ground line gradually hove aboard the vessel over a roller on the vessel's rail, the respondent's duties being to remove any fish from the hooks, and to disentangle and free the hooks and leaders as the gear was taken aboard, a lever for the purpose of starting and stopping the capstan being adjacent to his hand at the rail of the vessel.

During this operation, a hook caught some place over the side of the vessel, either upon some part of the vessel or her hull, or other parts of the ground line, and snapped loose from the strain of the winch, flying inboard and striking respondent in the eye, occasioning substantial injury.

The evidence in the case, consisting of all of claimant's evidence and the opening evidence of the peti-

tioner, does not disclose where the hook caught before snapping free and hitting respondent.

Respondent instituted suit for damages against the petitioner for $25,000.00 in the Superior Court of the State of Washington, and requested a jury trial.

Before trial of that cause, petitioner filed his petition for exemption from, or in the alternative, limitation of liability in the United States District Court for the Western District of Washington, Northern Division, before Honorable Jeremiah Neterer, Judge. Stipulation for value of the vessel and her earned and pending share of the proceeds, together with the petitioner's individual share, in the sum of $5,000.00 was approved by respondent, and filed in the limitation proceedings, and proceedings in the State Court were thereupon enjoined.

But one claimant appeared in the limitation proceedings, being the respondent, his claim being for $25,000.00 personal injury damages.

Claimant excepted to the petition upon the grounds that the Admiralty Court was without jurisdiction to proceed because: first, but one claim was involved; and second, that it appeared that the owner was on board as Master, and the respondent sought recovery upon the claim that the vessel was unseaworthy as built.

The District Court overruled the exceptions, and, at the close of claimant's evidence upon the contentions of privity and knowledge and the unseaworthiness of the vessel, found that the vessel was seaworthy in all respects; that no negligence on the part of the petitioner was shown, nor any act of commission or omission of imposed duty upon his part; that the vessel and her construction were not shown to have had any proximate connection with the cause of the claimant's injury; that the construction of the vessel was according to the usual and customary standard and design; and that the accident and injury to respondent was occasioned to respondent, an experienced fisherman, solely and proximately as the result of his own negligence and carelessness in wilfully failing to carry out his duties in the known and proper manner. (Apostles pps. 139-146.)

The District Court further found and decreed that the loss, damage and injury to the respondent "was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner. That the said petitioner be and he is hereby forever exempt and discharged from all loss, damage, destruction or injury arising from or growing out of said occurrence happening on board said vessel." (Apostles, page 151.)

DECISION OF CIRCUIT COURT OF APPEALS

Upon the foregoing facts, findings, conclusions and decree of the District Court, the Honorable Circuit Court of Appeals, on the 21st day of October, 1929, entered and filed its decision (Apostles, page 174) (reported as the "ALOHA," 1929, A. M. C. 1642), holding, in substance, that:

1st. The petitioner did not allege that the accident happened without his privity and knowledge.

2nd. That since it appeared from the pleadings that the petitioner, the owner, was on board his vessel as Master, the District Court was without jurisdiction to hear and determine the case, and should have dismissed the entire proceeding on the theory that if the petitioner were found to be liable at all, he must necessarily have been privy to and have had knowledge of the cause of the accident, and hence would not be entitled to secure limitation in any event.

3rd. That the right of an owner to maintain a proceeding under the limitation of liability statute is dependent upon:

(a) The theoretical question of whether or not the owner would be entitled to limit his liability, if he should be found negligent at all; and

(b) That this theoretical question is, in turn, independent of and should be determined independently of the question of whether or not the owner is actually negligent, either directly or by imputation of law, that is to say, *is independent of the actual facts of the case,* and is dependent upon the nature of the negligence *alleged* by the injured party as a basis for his recovery, and on the relation of the owner to such allegations, whether true or unfounded.

4th. That the only persons involved in the accident were the owner and Master, as petitioner, and the respondent, and

(a) Therefore, there was no basis for limitation of the liability of the owner upon a claim of negligence based upon *alleged* insufficiencies of the vessel's construction, as built, since, if the owner was liable to the extent of the value of the vessel, he must also necessarily have been liable for the entire damage suffered by the respondent.

5th. That upon the statement of the foregoing propositions, the District Court had no jurisdiction to proceed and pass upon the merits of the case, or to determine whether or not such allegations by the claimant were true, or if true, whether they constituted negligence of the owner in fact, directly or by imputation, *in the absence of the consent of the injured party, who had elected to bring his action at law*

in the Superior Court of the State of Washington before a jury.

6th. That the objection of the respondent to the jurisdiction of the court should have been sustained, and the court should have declined to pass upon the merits of the respondent's claim, and upon ascertaining that the owner was aboard and that it was alleged by the claimant that his injuries were occasioned with the knowledge and privity of the owner, that the proceeding should have been dismissed for lack of jurisdiction and the respondent allowed to proceed in the State Court.

7th. That by virtue of the provisions (Sec. 33) of the Merchant Marine Act of June 5th, 1920, 46 U. S. C. A., Sec. 688, the injured seaman is given the right to elect whether he shall proceed at common law before a jury, or in admiralty, notwithstanding the institution of a proceeding by the owner in a Court of Admiralty, seeking exemption from, or in the alternative, limitation of his liability, pursuant to Revised Statutes, Sec. 4283, 46 U. S. C. A. 183, reading as follows:

> "Liability of owner not to exceed interest. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done,

occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

And Revised Statutes, Sec. 4284, 46 U. S. C. A., 184, reading as follows:

"Apportionment of compensation. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

And Revised Statutes, Sec. 4285, 46 U. S. C. A. 185, reading as follows:

"Transfer of interest of owner to trustee. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer

all claims and proceedings against the owner shall cease."

8th. That without determination of the question of negligence of the owner or respondent, or without passing upon the affirmative defenses of the owner, the case should be remanded to the trial court, with directions to dismiss the case for want of jurisdiction, and respondent allowed to prosecute his claim in the State Court before a jury.

SPECIFICATION OF ERRORS

Petitioner respectfully submits that the Honorable Circuit Court of Appeals erred, and that its decision is in conflict with the decisions of this Honorable Court on the same matter; that by its decision the Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority, and has decided an important question of Federal law, which, if not already settled, should be settled by this Court in the following respects, viz:

Error No. 1

The literal effect of the decision of the Circuit Court of Appeals is to deny to all owners, or part owners, who go to sea with their ships as Masters, or otherwise, and who constitute the majority of the fishing fleets of the United States, the benefits of the

limitation of liability statutes, contrary to the purpose and intention of such statutes, and contrary to the established rule requiring liberal interpretation of the "privity and knowledge" provision of the same.

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 26 L. Ed., 1038, 3 S. Ct. 379;

La Bourgogne (Deslions vs. LaCompagnie Generale Transalantique), 210 U. S. 95, 120; 52 L. Ed. 973, 985; 28 S. Ct. 664;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Richardson vs. Harmon, 222 U. S. 96, 103; 56 L. Ed. 110, 113; 32 S. Ct. 27;

Flink vs. Paladini, 279 U. S. 58; 73 L. Ed. 613;

Capitol Transportation Co. vs. Cambria Steel Co.—The Benjamin Noble, 249 U. S. 334; 63 L. Ed. 631; 39 S. Ct. 292;

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612; 47 S. Ct. 357; 1927 A. M. C. 402;

The Henrietta, 1929 A. M. C. 327, 328.

There appears to be no sound reason why an individual owner, who goes to sea with his vessel, should not stand on equal ground with a corporate owner, or an individual owner, who does not go to sea with his ship, under the well established rule that if the owner uses due care and diligence in selecting

skilled and competent experts in the repair or construction of his vessel, the owner will be entitled to limit his liability for the negligence of such agents.

The Henrietta, 1929 A. M. C. 327;

Craig vs. Continental Ins. Co., 141 U. S. 638; 35 L. Ed. 886, 12 S. Ct. 97;

Butler vs. Hines, (C. C. A.) 278 Fed. 877;

The Tommy, 151 Fed. 570; 81 C. C. A. 50;

The Annie Faxon, 75 Fed. 312; 21 C. C. A. 366;

The City of Camden (C. C. A.) 269 Fed. 334;

The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56;

The 84-H, Appeal of Bouker Contracting Co., (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A.) 285 Fed. 7.

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1927 A. M. C. 1657; 15 Fed. (2nd) 166;

The Princess Sophia, 278 Fed. 180;

The Erie Lighter, No. 108, 250 Fed. 490;

The Muriel, 1928 A. M. C. 1005; 26 Fed. (2nd) 505;

The Commonwealth, 1929 A. M. C. 487; 31 Fed. (2nd) 142;

The Alola, 288 Fed. 1006;

Van Eyken vs. Erie R. R. Co., 117 Fed. 712.

Error No. 2

The Circuit Court holds that the petitioner did not allege that the accident happened without his privity and knowledge, simply because he did not use the specific words "privity or knowledge."

The petitioner, in substance, by obvious intendment, and in legal effect, alleged that the accident did not happen with his privity or knowledge.

The title of the petition discloses that the petitioner seeks not only exemption from, but, in the alternative, *limitation* of liability.

In the fourth article, it is alleged that the vessel was in all respects *seaworthy* and efficiently officered, manned, equipped and furnished, and well and sufficiently *fitted* and *supplied* with suitable engines, machinery, tackle, apparel, appliances and furniture, all in good order and condition and suitable for the business in which said vessel was engaged upon said voyage, and further, that the owner of said vessel at all times had exercised *due care and diligence to make said vessel in all respects seaworthy, etc.*

In the ninth article, it is alleged that the casualty was *due solely* to the negligence and carelessness of the claimant.

In the thirteenth article, it is alleged that the petitioner desires to claim the benefits of Sees. 4283, 4284 and 4285 of the Revised Statutes of the United States, and Acts amendatory thereof and supplemental thereto, and *further* desires to test his liability and the liability of the "ALOHA" to any extent whatever for the alleged loss.

Furthermore, in the prayer of the petition, the petitioner prays:

> "That the court in this proceeding will adjudge that petitioner and the said M. S. "ALOHA" are not, and neither of them is, liable to any extent for said loss, damage and injury; *or if it shall adjudge that they, or either of them, are liable then that the liability of petitioner be limited to the amount of the value of his interest in said vessel and the accrued share of the proceeds belonging to the said vessel and said petitioner at the close of said voyage.*" (Italics ours.)

It is, therefore, respectfully submitted that if the words "privity or knowledge" in the petition by the pleader constituted a technical insufficiency of pleading, it was purely one of form, and not one of substance, and if material, was curable by simple amendment, and would not justify the summary dismissal of the entire proceedings.

Under the established principles of Admiralty practice, the technical severity of common law pleading, with reference to unintended omissions, has been

surplanted by the established principle of procedure conforming to substantive justice and liberal right of amendment.

Revised Statutes, Sec. 954; 28 U. S. C. A. Sec. 777, provides as follows:

> "Defects of form; amendments. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

General Admiralty Rule No. 23;

Benedict on Admiralty (5th Ed.) Secs. 355 and 361 and cases cited.

Furthermore, were the omission of the use of the words "privity or knowledge" of substantive importance in the pleading, any insufficiency in this respect was cured by the evidence and the decree of the trial court based thereon, viz:

"That the accident described in the libel and petition herein and the loss, destruction, damage and injury arising therefrom, was not caused by the design or neglect of the petitioner, Axel Langnes, and did not occur with the privity or knowledge of said petitioner." (Apostles p. 148 et. seq.)

Benedict on Admiralty, (5th Ed.) Sec. 355 (and cases cited).

It is the settled rule that the issue of privity and knowledge is to be determined not upon the pleadings, but upon all the evidence.

Providence & New York S. S. Co. vs. Hill Manufacturing Co., 109 U. S. 578; 27 L. Ed. 1038;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A.), 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Namours & Co., 19 Fed. (2nd) 354;

The Princess Sophia, 278 Fed. 180;

The Llewellyn J. Morse—"Old Ironsides," 25 Fed. (2nd) 973.

If the decision of the Circuit Court of Appeals, that the petition failed to allege that the accident did happen without his privity and knowledge, were justifiable from the evidence, and the decree of the District Court is to be reversed upon that ground, then the case should not be dismissed, but remanded for further proceedings, since the petitioner in this case

did not put in his evidence with reference to negligence and privity and knowledge in answer to the claimant's evidence, for the case was brought to a close before the petitioner undertook to put in his evidence on these points. At the close of the claimant's case, following the petitioner's prima facie opening, the District Court sustained the petitioner's challenge to the sufficiency of the claimant's case and, therefore, none of the petitioner's evidence on the question of privity and knowledge, as well as the question of negligence, is before the court. The petitioner was prepared to show the following facts, which do not appear in the record as it stands, because petitioner has not yet had his day in court, viz:

That there are between three hundred and five hundred vessels similar to the "ALOHA," having the same or similar design and construction with reference to back-stays and sheet metal covering as the petitioner's vessel: that this type of construction, including the absence of sheet metal covering over the chain plates, is not only the standard, usual and customary construction for such vessels, but that petitioner, who was neither a naval architect, nor a shipbuilder, but a fisherman, had exercised due care and caution in having his vessel designed for him by a competent naval architect, and built precisely as she

was at the time of the accident by a competent shipbuilder, and that, therefore, even if the court should have found that her construction was such that she was unseaworthy in the respects alleged by the claimant, nevertheless, petitioner was without privity and knowledge thereof and thereto within the meaning of the statute, and, hence, in this case, the petitioner was not necessarily chargeable with knowledge and privity, even if negligence were found, to the extent that he must have been liable for the entire damage to rspondent, if liable at all.

Providence & New York S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578; 27 L. Ed. 1038;

La Bourgogne, 210 U. S. 95; 52 L. Ed. 973; 28 S. Ct. 664;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612;

The 84-H, Appeal of Bouker Contracting Co. (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co. (C. C. A.), 285 Fed. 7;

Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber Co., 197 Fed. 703; 117 C. C. A. 97;

The Suquamish, 1926 A. M. C. 1657; 15 Fed. (2nd) 166;

The Commonwealth, 1927 A. M. C. 487; 31 Fed. (2nd) 142.

It appears from the evidence in this case that the respondent was not an employee of the petitioner, but that both parties were engaged upon a common venture, having many of the characteristics of a joint enterprise, and the petitioner in this case, therefore, was entitled to show that many duties, obligations and responsibilities with reference to the condition, upkeep, maintenance and repair of the vessel's appliances, rigging and fishing gear, were, in fact and in legal effect, delegated by the owner and Master to the other fishermen on board, including the respondent, and, hence, the owner in this case should not be held to such strict standards of accountability as in the usual case, but rather that the generally liberal construction of the knowledge and privity provision of the statute should be still more liberally construed with reference to the petitioner in the case at bar.

The Commonwealth, 1929 A. M. C. 487; 31 Fed. (2nd) 142.

Error No. 3

The Circuit Court of Appeals erred in holding that, since the owner was on board as Master, the District Court, without the taking of testimony on the question of negligence, or upon such testimony as was taken, should have held that that Court was without jurisdiction to pass upon the merits of the case, and should have *first* determined and decided the ques-

tion of theoretical privity and knowledge, which might have existed, if any negligence should have been found upon the part of the petitioner, upon the assumption that if petitioner should have happened to have been negligent, or if the vessel should have happened to have been unseaworthy, pursuant to claimant's unsupported contentions, the petitioner must necessarily have been privy to and had knowledge of the accident within the meaning of the statute, and that the Court should dismiss the case for lack of jurisdiction.

It is respectfully submitted that this ruling of the Circuit Court of Appeals is in conflict with the decisions of this Court in the following cases:

Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207; 71 L. Ed. 612;

The Benefactor, 102 U. S. 214; 26 L. Ed. 157;

The Benefactor, 103 U. S. 239; 26 L. Ed. 351;

La Bourgogne, 210 U. S. 95; 28 St. Ct. 664; 52 L. Ed. 973;

Providence & New York S. S. Co. vs. Hill Mfg Co., 109 U. S. 578; 27 L. Ed. 1038;

Butler vs. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. Ed. 1017;

Capitol Transportation Co. vs. Cambria Steel Co.—The Benjamin Noble, 39 S. Ct. 292; 249 U. S. 334; 63 L. Ed. 631.

This decision is also in direct conflict with the decision of several of the Circuit Courts of Appeals as follows:

The 84-H, Appeal of Bouker Contracting Co. (C. C. A.) 296 Fed. 427;

Pocomoke Guano Co. vs. Eastern Transportation Co., (C. C. A.) 285 Fed. 7;

Standard Wholesale Phosphate & Acid Works vs. Chesapeake Lighterage & Towing Co. (C. C. A.) 16 Fed. (2nd) 765;

Petition of E. I. Du Pont de Nemours & Co. (C. C. A.) 19 Fed. (2nd) 354;

The Republic (C. C. A.) 61 Fed. 109;

The City of Camden (C. C. A.) 292 Fed. 97;

Quinlan vs. Pew (C. C. A.) 56 Fed. 111.

See also the following District Court decisions:

The Princess Sophia, 278 Fed. 180;

The Llewellyn J. Morse—"Old Ironsides," 25 Fed. (2nd) 973.

Error No. 4

The Circuit Court of Appeals erred in directing the dismissal of the case upon what is respectfully submitted as a fundamentally erroneous theory, namely: that if the vessel should have been held unseaworthy, which it was not, and if the petitioner should have been negligent, which he was not, and hence should not have been entitled to limit his liability, that the District Court would then have been, and hence,

irrespective of the petitioner's negligence, must be without jurisdiction to retain the cause and decree full recovery to claimant if the facts so warranted to the exclusion of the pending proceeding in the State Court.

The early decisions on this point, though expressing some uncertainty on the subject, are in conflict with this decision of the Circuit Court of Appeals, viz:

> *In re The Titanic—Oceanic Steam Navigation Co.—Appeal of the Long Island Loan & Trust Co.*, 204 Fed. 295;
>
> Affirmed in principal, 204 Fed. 260;
>
> *Huasteca Petroleum Co. vs. Cia de Navagacao Lloyd Brasileiro* (D. C. N. Y. 1924) 297 Fed. 318, 326.

In addition to being apparently untenable and in conflict with this Court's decision as to the scope, purpose and effect of the limitation of liability statute, as set forth in the case of *Providence & New York S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578; 27 L. Ed. 1038, this ruling of the Circuit Court of Appeals seems to be squarely in conflict with the decision of this Court in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612.

With the rendition of the last mentioned decision, we believe the law to be settled that, if the amount of the claim or claims against an owner exceeds the value of the vessel and her pending freight at the end of the voyage, and if the owner invokes the jurisdiction of the Admiralty Court under the limitation of liability statute, and places the Court in the possession of the vessel and her freight, or in lieu thereof a stipulation for value therefor, then, and in that event, the Admiralty Court has full jurisdiction and authority, and it is its duty, to retain jurisdiction of the cause, and decree appropriate relief to all parties, as well when limitation is denied, as when limitation is granted.

As Justice Taft so ably observes in the last mentioned decision:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell vs. U. S. Dist. Ct.* 71 C. C. A. 288, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cor-

nered controversy and is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner, the limitation extending to the owner's property as well as to his person.

The City of Norwich, supra.

"With this general view of the statute, we come to the contention of the petitioner in this case. He says that the owner only brings the suit to limit his liability, if it exists, to the vessel and the freight for the voyage. If he fails in his purpose and does not establish the limitation, no progress can be made in behalf of the defendant or the claimants in the collection of what has been found due them, and because he has lost that feature of his suit against them, the case must be dismissed. * * * The parties, it is argued, must thereafter be remitted to a common law or equity court of the state to secure their rights, unless diverse citizenship or the admiralty character of their claims entitles them to resort to, or remain in, a Federal court.

"Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that unless the petitioner wins, the court does not have power to administer justice. There is nothing in the statute nor in the rules that requires so feeble a conclusion. * * * If Congress has constitutional power to gather into the admiralty court all claimants against the vessel, and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the res and by judgments in personam for deficiencies against the owner if not released by virtue of the statute. * * * * * But this lim-

itation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 27 L. Ed. 1038, 3 Sup. Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict, Admiralty, 5th Ed. Sec. 70, note 97). There necessarily inheres therefore in the character of the limitation of liability proceeding in reference to such non-admiralty claims, the jurisdiction to fulfill the obligation to do equitable justice to such claimants by furnishing them a complete remedy. * * * * * That litigation as we have seen may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not."

See also the decisions of the District Court for the Southern District of New York, viz:

The Linseed King — Petition of Spencer Kellogg & Sons Inc., 24 Fed. (2nd) 967.

In Re Atlantic Gulf & West Indies S. S. Lines, 20 Fed. (2nd) 975.

Error No. 5

It is respectfully urged that the Circuit Court of Appeals erred in holding that the complete and full jurisdiction of the Admiralty Court, which is decreed in the above mentioned case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co., supra*, is dependent upon the consent or election of the respondent.

This ruling of the Circuit Court of Appeals is in direct conflict with the decisions of this Court, in addition of the last mentioned decision, and is in conflict with the decisions of the Circuit Courts of Appeals and the District Courts of the United States in that, first, the jurisdiction of the Federal Admiralty Courts is limited and controlled by law and cannot be conferred by consent, and want of jurisdiction cannot be waived, modified or affected at the discretion or election of any party, viz:

King Iron Bridge Co. vs. Otoe County, 120 U. S. 225; 30 L. Ed. 623; 7 S. Ct. 552;

New England National Bank vs. Calhoun, C. C. A. (N. M.) 9 Fed. (2nd) 272;

Highway Construction Co. vs. McClelland, C. C. A. (Mo.) 14 Fed. (2nd) 406;

Danks vs. Gordon, C. C. A. (N. Y.) 272 Fed. 821;

New York Life Ins. Co. vs. Johnson, C. C. A. (Iowa) 255 Fed. 958;

Perez vs. Canadian Land & Fur Co., D. C. (La.) 14 Fed. (2nd) 181;

McLaughlin vs. Western Union Tel. Co., D. C. (L. A.) 7 Fed. (2nd) 177;

Rosenberg vs. Shuler, D. C. (Okl.) 289 Fed. 820.

and, second, the decision of the Circuit Court of Appeals that the jurisdiction of the Admiralty Court, under a petition for limitation of liability, fails, and that the petitioner's proceedings should be dismissed

for want of jurisdiction at the instance of a seaman, who declares an election to prosecute his claim before a jury in a court of law, is squarely in conflict with the decision of this Court, in the case of

The Edward, In re East River Towing Co., Inc., (N. Y. 1924) 266 U. S. 355; 45 S. Ct. 114; 69 L. Ed. 324, 1925 A. M. C. 33.

Upon the same point the decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit, viz:

In re Petition of Union Sulphur Co. (C. C. A., N. Y. 1924) 5 Fed. (2nd) 1023;

The Clarence P. Howland (C. C. A., N. Y. 1925) 6 Fed. (2nd) 791.

Wherefore, it is respectfully submitted that the petition for writ of certiorari in this case should be granted, and the decree of the Circuit Court of Appeals for the Ninth Circuit reversed, with directions to affirm the decree of the District Court.

Respectfully submitted,

IRA BRONSON,

H. B. JONES,

ROBERT BRONSON,

Proctors for Petitioner.

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In the Supreme Court United States

No. 38

October Term, 1929

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioner, Axel Langnes

H. B. JONES,
ROBERT E. BRONSON,
Proctors for Petitioner.

614-621 Colman Building,
Seattle, Washington.

(34,748)

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In the Supreme Court United States

No. 617

October Term, 1929

AXEL LANGNES, Owner of the Diesel Halibut Vessel, "ALOHA," Her Engines, etc.,

Petitioner,

vs.

WINFIELD A. GREEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioner, Axel Langnes

STATEMENT

Two statements made in respondent's answer brief under the heading "Statement of Facts," being erroneous and material, are here corrected.

It is stated in the 6th and 7th and 13th to 18th lines, page 6, in what respondent submits as the substance of petitioner's testimony, as follows:

"While he was hauling in the ground line, one of the hooks caught *in the side of the vessel* * * * "* * * after the accident the sheet iron plate was extended to cover the backstay irons which were along the side of the vessel in the vicinity of the crooler to *keep the hooks from catching on them when the ground-line was hauled in.*"

There is no such testimony as this by the petitioner anywhere in the record.

The petitioner has not yet testified as to what fouled the hook in question and caused it to fly inboard. And he did not testify that the sheet iron was extended on the vessel to keep the hooks from catching on the chain plates or "back stay irons," as they are referred to. His testimony on this point was as follows:

"Q. Now, what is the purpose of that plate? Why did you put it on the side of the vessel?

A. It is to eliminate the hooks, and protect the vessel.

Q. That is to keep *a* hooks from catching on the backstay lines?

A. No, sir.

Q. Isn't that why you put it on?

A. No.

Q. What did the hooks catch in?

A. They catch in the soft wood.

Q. They will catch in the crevices where the iron is up against the wood, don't they?

A. I don't get what you mean.

Q. Here is the iron (indicating). That is not covered with zinc?

A. It is placed on top of the wood.

Q. That leaves a crack between the iron and the wood?

A. No.

Q. Don't the hooks catch in that?

A. It don't leave a crack.

Q. It leaves something, don't it, where the iron joins the wood?

A. It catches right flush up against the stay.

Q. It leaves the corners sticking up?

A. No, the corners are rounded.

Q. Why did you put zinc over the iron?

A. For no material purpose, except merely the reason this sheet iron was extending up to the second chain plate (R. 61-62).

The only testimony with reference to the catching of this hook was by the respondent, and he testified as follows:

"Q. Go ahead and tell the court what happened?

A. Well, this hook catches in this iron; you can not see when it is caught; you do not know until the strain comes on it; you have very little slack, or none at all; and you don't have much time. In this case it is possible that by jump-

ing to the lever, going toward this thing that was going to hit me that I might have—* * *

Q. What actually happened, tell us what happened, and not what you thought.

A. Well, this hook jumped back and hit me right here in the eyeball. * * *" (R. 77-78).

And on cross examination, the respondent further testified:

"Q. In all of the time that you have been engaged in fishing you have been accustomed to hooks catching in various places about the ship while being pulled in.

A. They catch in different places, yes (R. 90-91).

* * *

Q. Where were you standing when the hook first caught?

A. About in here (indicating), walking back and forth between the winch and here, and I was clear out, I think I was standing about here: I seen it coming, and I stepped over here and hoped it would go by me, because I guessed, when they caught, that is the only place where they caught (R. 92-93).

THE COURT: How frequently did these hooks catch?

A. Well, I could not say that.

THE COURT: Often, or just occasionally?

A. Well, whenever the line was hauling in, occasionally, the hooks caught, as the line was coming in, whenever it did not turn on the roller; quite often.

Q. You were the only man who was standing between the winch and the water?

A. Yes.

Q. And at the time you were out there handling the groundline and the fish?

A. Yes; handling the line and the fish.

Q. That is, you were tending the ground-line?

A. Yes.

Q. Was this winch power driven?

A. Yes; this winch was power driven.

Q. Where is it controlled?

A. It is controlled by levers.

Q. Yes.

A. The lever we used is right here (indicating on the photograph).

Q. That shows in that photograph; that is this lever (indicating).

A. Yes.

Q. Is there any other lever that controls it?

A. Yes, there were two other levers. There was one over here further that worked down against the forecastle-head.

Q. I just asked you where they were located.

A. On the girder, the one against the forecastle.

Q. So there were three different locations form which the winch was controlled?

A. Yes.

Q. And these controls were used to stop and start it?

A. Yes.

Q. Who was doinng the starting and stopping of the winch as you tended the line?

A. I was.

Q. Was that a part of your duty?

A. Yes.

Q. You were supposed to control that?

A. Yes.

Q. You did not stop the winch on the occasion this hook caught?

A. No; I would not go towards it. I never did.

Q. Did you make an effort to stop it over here by the rail?

A. No, I did not.

Q. Did you make an effort to stop it over here by the winch?

A. No sir.

Q. Did you make an effort to stop it over by the wheel-house?

A. I could not get over there. It was utterly impossible for me to get to that lever.

Q. In your experience on board this ship, Mr. Green, did you customarily allow hooks to be drawn out when they caught here and there on the vessel?

A. Yes, if they catch, I always let them tear out.

Q. Allow the power to pull them out?

A. Yes; that is right.

Q. Did you ever have any of the hooks catch in your clothing tending the ground-line?

A. Yes, I have had that happen.

Q. Have you ever had a hook catch on the deck tending ground-line?

A. Yes, I have.

Q. Did you ever have two hooks catch together coming in on the ground-line?

A. Yes, I have. (R. 93-95.)

* * *

Q. How many times have you attended ground-line or seen men attending ground-line?

A. That would be impossible for me to answer.

Q. Well, many, many times over a period of years?

A. Yes.

Q. And during that time you have seen hooks catch many times, in many places on the ship?

A. I have seen them catch several times.

Q. And it was your duty, was it not, when the hooks caught any plaace about the ship, or in your clothing, or wherever they could catch, to stop your winch and clear them, was it not?

A. If I had time, which I done.

Q. That was your duty?

A. If I had the time.

Q. That was a part of your duty?

A. Had I done it at this time—

Q. That was part of your duty?

A. Yes.

Q. And you understood it as such.

A. Yes; but you cannot say so absolutely.

Q. Now, you say these hooks caught several times in this chain plate?

A. Yes.

Q. Were you standing in the same position at the time you were hurt when they caught there?

A. Yes.

Q. That is, you were standing back a few feet from the rail?

A. Yes; working there, and walking back and forth.

Q. As a matter of fact, if you were standing even up against the rail, you could see the chain plate from the deck, can you; but if you were back a few feet from the rail, you cannot see any part of the chain plate?

A. No, only just the top part.

Q. So, when you told the court this caught on the chain plate on this particular occasion, you are assuming that it caught there?

A. That is the only place I know of that it could have caught on.

Q. You just assume it caught there because that is the only place you think it could have caught; is that correct?

A. Well, yes." (R. 96-97.)

This is the actual evidence in the record as to how the accident happened, and conclusively establishes the further inaccuracy of the statement found in respondent's brief, beginning in line 9 on page 8 as follows:

"A hook caught on the side of the vessel in the direction of the back stay irons * * *"

The remaining members of the crew of this vessel called by the respondent as his own witnesses verified the fact that hooks customarily and commonly caught upon any and all parts of vessels when the same operation was taking place as that during which the respondent was injured.

The witness, Jacob Peterson, testified as follows:

"Q. Did you have any trouble with hooks catching on the iron while you were on board?

A. They catch on all boats." (R. 106-107.)

The witness, Ed Bralen, testified as follows:

"Q. In your experience in handling these lines on board these vessels you say the hooks frequently catch in various parts of the ship, and you have stopped the winch and disengaged them?

A. Yes. (R. 118-119.)

* * *

Q. Then when a hook catches, you take the trouble to manipulate the lever instead of getting out of the way of the hook?

A. Naturally.

Q. Does everybody do that, do you know?

A. Well, I could not say as to that. Everybody does that if a person is playing safe. * * *

Q. Now, you say if there are dents in the zinc where there are nails, the hooks will catch in the dents?

A. Yes." (R. 121.)

The witness, Severine Holmess, testified as follows:

"Q. In your experience in tending ground-lines, was it a frequent occurrence, or an occasional occurrence that hooks would catch about the vessel in various places?

A. Oh, yes. They can catch mostly on anything. You might miss a fish; take fish fifty or sixty pounds, and you sometimes may have a fish, and you miss it. You get the roller, and then the chance you have to catch the hook; why, the hook might go into the sheet iron, or any place.

Q. Do these hooks on these gangions ever catch on anything when you are tending ground-line, and when it is being pulled in by the winch?

A. Yes. You drop them on the deck; and you can see where the deck is all chewed up; they will catch any place where it is rough wood, they will catch.

Q. Have you ever seen them catch on sheet iron?

A. Not except there was a hole or a dent from a nail.

Q. They will catch then, will they?

A. Yes.

* * *

THE COURT: How often did that occur. How often did the hooks catch?

A. Oh, they may catch many times a day on the sheet iron.

Q. Is that true of all vessels you have been on?

A. Well, I ain't been no place where—I ain't been on any vessels where they don't catch some place on the vessels." (R. 128-129.)

The witness, Axel Edwards, testified as follows:

"Q. Have you ever had any experience with hooks catching on various parts of the vessel?

A. Yes.

Q. Would you say that was a common occurrence?

A. Yes.

Q. In your experience?

A. In my experience.

Q. What would you do when they caught?

A. Either stop the winch myself, or have someone else stop it.

Q. Then you can stop it?

A. Yes.

Q. Disengage the hooks and untangle them?

A. Yes." (R. 136-137.)

ARGUMENT

From the foregoing undisputed evidence it is clear that no part of the petitioner's vessel was defective, and equally clear that neither the vessel nor any of her equipment had any proximate connection with the accident, as a *contributing cause.*

In the face of actual facts, the fictitious and unfounded allegations of the claimant and respondent in the pleadings become wholly unimportant for any purpose.

In deciding the case of *Aetna Insurance Company vs. Boon*, 95 U. S. 117, 130, 24 L. E. 395, this Court had occasion to state:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental and are instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

Again in the case of *Milwaukee, etc. Railway Co. vs. Kellogg*, 94 U. S. 469, 475, 24 L. E. 256, 259, the court said:

> "Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

McGill etc. vs. Michigan S. S. Co., 144 Fed. 788, 792.

This rule is also aptly stated by Judge Woolsey in the District Court for the Southern District of New York in the case of *El Sol-Sac City,* 1930 A. M. C. 2015, 2020, decided November 3, 1930.

> "To preclude limitation on the ground of privity or knowledge, it is not, in my opinion, sufficient merely to prove that there was a failure in equipment, inspection or personnel to which the ship owner was privy, or of which he had knowledge. It must be shown that the fault in equipment, inspection or personnel actually contributed to the accident in respect of which the ship owner seeks limitation.
>
> "This is a practical world, and an omission to which a ship owner is privy but which has not any causal connection with the damage for which claim was made is venial in the eyes of the law. *Thessaloniki,* 267 Fed. 67, 70 (2 C. C. A.)."

We believe it clear that the accident to claimant and respondent did not happen with the privity or knowledge of the petitioner within the meaning of the Limitation of Liability Statute. The evidence admits of no other conclusion, the trial court so expressly found and decreed (R. 139-152), and the circuit court of appeals did not disturb this finding (R. 174-186).

No negligence or fault upon the part of any one, other than the claimant and respondent, existed in this case, as is conclusively established by all of the

evidence, being principally that of the claimant and respondent himself and his witnesses. There being no negligence of the petitioner, he cannot under any conceivable theory be charged with knowledge or privity within the meaning of the Limitation of Liability Statute, and the only court which has passed upon the question of the actual existence or absence of negligence, i. e., the District Court, so found.

The respondent and the Honorable Circuit Court of Appeals cite the cases of *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 397 (9 C. C. A.), and *Parsons vs. Empire Transportation Company*, 111 Fed. 202 (9 C. C. A), in support of the contention which they make to the effect that, if privity and knowledge upon the part of a petitioner exist, *the entire limitation proceeding must be dismissed.*

We do not believe these cases, and especially the *Parsons vs. Empire Transportation* case, to be controlling authorities to that effect, and they certainly are not in point with the case at bar, for there privity and knowledge upon the part of the petitioning owners were clearly established and decreed by the lower courts, as well as the Appellate Court, the contrary being true in the instant case. Furthermore, in deciding the *Weisshaar* case, the court does not discuss the question of whether the denial of the right

to limit the liability necessitated, or did not necessitate, the dismissal of the proceeding below, but in one brief sentence at the conclusion of its decision, remanded the case, with instructions that the proceedings be dismissed, and the claimant allowed to prosecute a State Court action.

The case of *Parsons vs. Empire Transportation Company* (supra) is similarly distinguishable from the case at bar in that knowledge and privity were found and affirmed, and, furthermore, the Appellate Court did not necessarily, as we read the decision, hold that the limitation proceeding should be dismissed, for there the court merely held that "The judgment is reversed, with costs to the appellants, and with directions to deny the petition for limitation of liability," the lower court apparently being left free, after denying limitation, to decree full recovery to the claimant against the petitioner.

The further decisions of this same Circuit Court of Appeals bear out that the petitioner's construction of this holding is probably correct, for in the later case of *McGill vs. Michigan S. S. Co.*, 144 Fed. 788 at p. 792, privity and knowledge of the owner were also found, but the court concludes its decision as follows:

> "The limitation of its liability must be denied. The decree is reversed as to the appellant, and the cause is remanded for further proceedings not inconsistent with the foregoing opinion."

Although limitation was denied, the proceeding was not dismissed, but remanded for further proceedings, and since this case has been cited as frequently and with as uniform approval as have both the *Weisshaar* and the *Parsons* cases above mentioned, we believe it clear that the respondent's theory of the latter of the two last mentioned cases is erroneous in fact, as well as in theory.

The most recent case which the writer finds on this point is the case of *Dumper Scow No.* 0-21, 1930 A. M. C. 1530, decided in the United States District Court for the Eastern District of New York, July 9th, 1930, by Judge Galston, subsequent to the filing of petitioner's brief in support of his petition in this case. There knowledge and privity of the owner of the scow were found and limitation was denied, but notwithstanding that the decision of the Circuit Court of Appeals, which is here under discussion, was relied upon as an authority, the court held:

> "There remains for consideration the question of whether the claimant may proceed with his state court action. He desires so to do. On the

other hand, the petitioner contends that the whole matter is now before the court. Both parties cite *Aloha,* 1929, A. M. C. 1942, 35 Fed. 2nd, 447, but a construction of the authorities relied upon would be academic, because claimant's answer seeks not only dismissal of the petition but also to have the petitioner held liable for the loss and damage caused by the accident and prays that a decree may be entered herein for the claimant's damages in full. Indeed he sets forth claimant's claim in full.

"Accordingly, it would be improper to vacate the stay of the state court action. The matter will be referred to a Commissioner to ascertain the amount of claimant's damages."

It is submitted that this point is disposed of adversely to the ruling of the Circuit Court of Appeals under discussion, by the further authorities cited on pages 24, 25, 26 and 27 of petitioner's brief in support of its petition for writ of certiorari, and petitioner here desires to submit an additional decision of this court in support of his petition, being the case of *Republic of France vs. French Overseas Corp.,* 227 U. S. 323, 331, 72 L. E. 901, 904, decided in May, 1928. Other suits had been enjoined in the limitation proceedings, and the District Court and the Circuit Court of Appeals denied both exoneration from and limitation of liability, but, nevertheless, the proceeding was not dismissed, and the cargo owner, there

the petitioner, was allowed recovery without limitation, this court there holding, viz.:

> "But for all damages legally attributable to the breach of warranty of seaworthiness, petitioners may recover, and the disposal of the case by the Circuit Court of Appeals on this basis is affirmed."

On page 23 of his brief, respondent makes the surprising contention that the *Weisshaar and Parsons cases* (supra) have been passed upon by this court with approval solely by reason of the fact that certiorari was denied in each case.

The rule is well established that the denial of certiorari has not the effect of an affirmance and imports no approval or opinion on the merits.

This court has frequently passed upon this point, the leading case being *Hamilton-Brown Shoe Company vs. Wolfe Brothers & Co.*, 240 U. S. 251, 258, 60 L. E. 629, 634, 36 Sup. Ct. Rep. 269, the court there observing:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ (writ of certiorari) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

The case of *U. S. vs. Carver*, 260 U. S. 482, 490, 67 L. E. 361, 364, 43 Sup. Ct. Rep. 181, is to the same effect, the court there holding:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times. Therefore it is unnecessary to consider whether the libellants' argument is supported by the decisions to which they refer."

The decision in the case of *Erie Lighter No.* 108, 250 Fed. 490, cited on pages 15 and 16 of respondent's brief, to the effect that in a limitation of liability proceeding the court should first determine the question of knowledge or privity before determining whether or not any liability exists at all, does not conform to the well-established rule laid down by this court in the very cases which are cited by District Judge Haight in support of his ruling. As we read these authorities, they are directly to the contrary.

In the case of *Providence & N. Y. S. S. Co. vs. Hill Manufacturing Co.*, 109 U. S. 578, 27 L. E. 1038, 1044, this court held:

> "In promulgating the Rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the Act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted which should bring all the parties interested into one litigation, and all the claimants into concourse for a *pro rata* dis-

tribution of the common fund, it is manifest that in most cases the benefits of the Act could never be realized. * * * The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all, if that point is contested and has not been decided; and, secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions."

Again in the case of *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207, 214, 215, 71 L. E. 612, 615, 47 Sup. Ct. Rep. 357, the court reviews the entire subject, and again affirms the rule laid down in the *Providence & N. Y. S. S. Co.* case, (supra):

"These decisions establish, first, that the great object of the statute was to encourage ship-building and to induce the investment of money in this branch of industry by limiting the venture of those who build the ships to the loss of the ship itself or her freight then pending, in cases of damage or wrong happening, without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law differing from the English maritime law; and that such a proceeding is entirely within the constitutional grant of power to Congress to establish courts of admiralty and mari-

time jurisdiction (*Norwich & N. Y. Transp. Co. vs. Wright,* 13 Wall. 104, 20 L. ed. 585), that to effect the purpose of the statute, Admiralty Rules Nos. 54, 55, 56 and 57 were adopted by which the owner may institute a proceeding in a United States district court in admiralty against one claiming damages for the loss in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel as appraised after the occurrence of the loss and the pending freight for the voyage; that these damages shall include damages to goods on board, second, damages by collision to other vessels and their cargoes, and, third, any other damage or forfeiture done or incurred; that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding by monition and enjoined from suing the owner and vessel on such claims in any other court; that the proceeding is equitable in its nature, and is to be likened to a bill to enjoin multiplicity of suits (*Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.,* 109 U. S. 578, 27 L. ed. 1038, E Sup. Ct. Rep. 379, 617); that by stipulation after appraisement the vessel and freight may be released, and the stipulation be substituted therefor, that on reference to a commissioner and the coming in of his report, it shall be determined, *first,* whether the owner and his vessel are liable at all; *second,* whether the owner may avoid all liability except that of the vessel and pending freight; *third,* what the amount of the just claims are, and *fourth,* how the fund in court should be divided between the claimants. The cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the

substituted fund (*Place vs. Norwich & N. Y. Transp. Co.*, 118 U. S. 468, 503, 30 L. ed. 134, 147, 6 Sup. Ct. Rep. 1150) that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not (*The Hamilton Old Dominion S. S. Co. vs. Gilmore*, 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133), and that they may include damages from a collision, from personal injuries (*Butler vs. Boston & S. S. S. Co.*, 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612), or for wrongful death if arising under a law of Congress, a state of the Union or a foreign state, which is applicable to the owner and the vessel (*La Bourgogne — Deslions vs. La Campagnie Generale Transatlantique*, 210 U. S. 95, 138, 52 L. ed. 979, 993, 28 Sup. Ct. Rep. 664).

"It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding."

With all due respect to the decision of District Judge Haight on this point, in the case of *Erie Lighter No.* 108 (supra), it is submitted that these controlling decisions of this court have not been overruled, and Judge Haight's decision should be classified as improvident and erroneous, and that the de-

cision of the Circuit Court of Appeals in the instant case must fall by the same test.

RESPONDENT'S ATTACK UPON THE DECISION UNDER REVIEW

We come next to a discussion of Sub-Division II, referred to at the bottom of page 11 of respondent's brief, and discussed, beginning on page 24 thereof, which is designated by respondent as follows:

> "When a seaman sues for personal injuries in the State Court and there is only one possible claimant and one owner, the advantage of the Limited Liability Act must be obtained by proper pleading in that Court and not by filing a petition in the United States District Court."

In the first place, it will be noted that this point was decided adversely to respondent's contention in the trial court, and by the decision of the Circuit Court of Appeals here under review. Respondent has filed no petition, or cross-petition for certiorari in this court. Therefore, it is submitted that this question is not properly before this court for consideration.

Petitioner bases this contention upon the following decisions of this court:

> *Hubbard vs. Tod*, 171 U. S. 474, 494, 43 L. E. 246, 256, 19 Sup. Ct. Rep. 14;

Alice State Bank vs. Houston Pasture Co., 247 U. S. 240, 242, 62 L. E. 1096, 1098, 38 Sup. Ct. Rep. 496;

Montana Mining Co. vs. St. Louis Mining & Milling Co., 186 U. S. 24, 31, 46 L. E. 1039, 1041, 22 Sup. Ct. Rep. 744;

Federal Trade Commission vs. Pacific States Paper Trade Association, 273 U. S. 52, 57, 71 L. E. 534, 539, 47 Sup. Ct. Rep. 255;

Republic of France vs. French Overseas Corp., 277 U. S. 232, 331, 72 L. E. 901, 904;

French Republic vs. Saratoga Vichy Springs Co., 191 U. S. 427, 440, 48 L. E. 247, 253, 24 Sup. Ct. Rep. 145.

Hamilton-Brown Shoe Co. vs. Wolfe Brothers & Co., 240 U. S. 251, 257, 60 L. E. 629, 633, 36 Sup. Ct. Rep. 269;

Charles Warner Co. vs. Independent Pier Co., 278 U. S. 85, 91, 73 L. E. 195, 198, 49 Sup. Ct. Rep. 45;
Steele vs. Drummond, 275 U. S. 199, 203, 72 L. E. 238, 239, 48 Sup. Ct. Rep. 53;

Webster Electric Co. vs. Splitdorf Electrical Co., 264 U. S. 463, 464, 68 L. E. 792, 793, 44 Sup. Ct. Rep. 342;

The Maria Martin, 12 Wall. 31, 40, 20 L. E. 251, 252.

In the case of *Hubbard vs. Tod* (supra), it was held:

"This case belongs to the class of cases in which the decree of the circuit court of appeals is made final by the statute, and having been

brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal.

"And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

In the case of *Alice State Bank vs. Houston Pasture Co.* (supra), it was held:

"A plausible argument can be made that the working of the Act of 1870 and other pertinent facts and statutes which we do not recite was to give to the land warrant the validity and effect that it would have had if lawfully executed in General Houston's life. But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this court. (*Hubbard vs. Tod*, 171 U. S. 474, 494, 43 L. Ed. 246, 256, 19 Sup. Ct. Rep. 14)."

In the case of *Montana Mining Company vs. St. Louis Mining & Milling Co.* (supra) it was held:

"By Rule 22 of this court, appeals and cross-appeals are heard together, and the practice is the same as under writs and cross-writs of error. Where there are cross-appeals or cross-writs of error in the Circuit Courts of Appeal in cases in which the decrees or judgments are made final in that court by statute, and the cases are brought here on certiorari, we consider only the errors assigned by petitioner, unless a cross-writ of certiorari is applied for and allowed." (*Hubbard vs. Tod*, 171 U. S. 474, 494, 43 L. E. 246, 256, 19 Sup. Ct. Rep. 14.)"

In the case of *Federal Trade Commission vs. Pacific States Paper Trade Association* (supra) it was held:

> "Respondents, notwithstanding their failure to petition for certiorari, now ask for reversal of that part of the decree which leaves in force part of paragraph (e) and paragraphs (g) and (h). This court has the same power and authority as if the case had been carried here by appeal or writ of error.
>
> "A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the decree reviewed. *Hubbard vs. Tod*, 171 U. S. 474, 494, 43 L. E. 246, 253, 19 Sup. Ct. Rep. 14; *French Republic vs. Saratoga Vichy Springs Co.*, 191 U. S. 427, 440, 48 L. E. 247, 253, 24 Sup. Ct. Rep. 145; *Alice State Bank vs. Houston Pasture Co.*, 247 U. S. 240, 242, 62 L. E. 1096, 1098, 38 Sup. Ct. Rep. 496; *C. F. Hamilton-Brown Shoe Co. vs. Wolfe Brothers & Co.*, 240 U. S. 251, 257, 60 L. E. 629, 633, 36 Sup. Ct. Rep. 269.

In the case of *Charles Warner Co. vs. Independent Pier Co.* (supra), it was held:

> "Objections to the decree below were offered by counsel for respondents in briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner. *Steele vs. Drummond*, 275 U. S. 199, 203, 72 L. E. 238,

239, 48 Sup. Ct. Rep. 53; *Federal Trade Commission vs. Pacific States Paper Association,* 273 U. S. 52, 71 L. E. 534, 539, 47 Sup. Ct. Rep. 255; *Webster Electric Co. vs. Splitdorf Electrical Co.,* 264 U. S. 463 464, 68 L. E. 792, 793, 44 Sup. Court Rep. 342; *Alice State Bank vs. Houston Pasture Co.,* 247 U. S. 240, 242, 62 L. 1096, 1098, 38 Sup. Ct. Rep. 496; *Hubbard vs. Tod,* 171 U. S. 474, 494, 43 L. E. 246, 256, 19 Sup. Ct. Rep. 14; *The Maria Martin,* 12 Wall. 31, 40, 20 L. E. 251, 252."

Based upon the foregoing authorities, we conclude that the argument raised by respondent under Sub-Division II of his brief will not be considered, but in the event of its consideration, petitioner submits the following argument in reply.

The question may be briefly stated, in substance, as follows:

Where a seaman, injured at sea, institutes a state court action under Section 33 of the Merchant Marine Act of 1920, but one claimant and one owner appearing, *must* the owner, in order to limit his liability, attempt to do so in the state court action, or may he institute an independent proceeding in a court of admiralty to limit liability and enjoin the state court proceeding?

In arguing this question respondent is primarily confused and thrown into error by his inability, or

failure, to distinguish between the words "must" and "may."

The answer to the question is:

The owner may attempt to secure limitation of his liability in the state court action, but he is not *required* to do so, and he may unquestionably elect to institute a proceeding to limit his liability in the admiralty court and enjoin the state court proceeding.

Simply stated, respondent's contention is that a single claim for personal injuries, sustained by a seaman on board ship, does not constitute jurisdictional grounds for the owner of said vessel to limit its liability against said claim for said injuries.

The petition in this case does not disclose, as appellant presupposes, that only one possible claim is involved, but even though it did, respondent's position on this point is wholly untenable, the precise question having been many years ago definitely and authoritatively settled and disposed of by this court contrary to respondent's contention.

The court will, of course, observe that the cases which appellant cites in his brief, with the exception of the *Carlisle Packing Company Case*, which case, neither by application nor analogy, has the slightest bearing upon the present question under consideration, all

antidate the case of *Richardson vs. Harmon*, 222 U. S. 96, 56 Law Ed. 110, which was decided on *November* 20, 1911, and the case of *White vs. Island Transportation Company*, 233 U. S. 346, 58 Law Ed. 993, which was decided by thi scourt on April 13, 1914.

In the two last mentioned cases, to which we shall hereafter refer in greater detail, and in the *White vs. Island Transportation Company* case particularly, this court laid down the definite and detailed rule completely disapproving the theory on which respondent relies.

Since the dates of said last mentioned decisions, the authorities, *without exception,* have held that a single claim, whether for personal injuries or otherwise, is sufficient to entitle a ship owner, as a matter of right, to maintain the proceedings which petitioner has herein instituted. Further than this, Benedict, in his work on Admiralty, 5th Edition, likewise states the law to be contrary to respondents contention, and cites, among his authorities in support of such statement, *that the cases of The Rosa,* 53 Fed. 132; *The Eureka No.* 32, 108 Fed. 672, and *The Lotta*, 150 Fed. 219, *have long since been overruled.* Bendict's text, Sec. 494, at page 593, reads as follows:

> "It is not a jurisdictionaal requirement that there be more than one claim; a single claim will authorize a limitation proceeding."

In support of this statement, Benedict cites many authorities upon which we shall hereafter touch, chief among them being *White vs. Island Transportation Company*, supra.

Since the decision in the last mentioned case, so far as the citators disclose, that decision has been cited only with approval and followed, among others, by the following cases:

Ship Owners' & Merchants' Tug Boat Co. vs. Hammond Lumber Co. (9th C. C. A.), decided November 17, 1914, 218 Fed. 161;

In re Louisville v Cincinnati Packet Co., decided April 3, 1915, 223 Fed. 185;

The T. W. Wellington, decided September 5, 1916, 235 Fed. 728;

The George W. Fields, decided April 12, 1915, 237 Fed. 403;

The Tug No. 16, decided November 14, 1916 (expressly disapproving The Rosa), 237 Fed. 405;

Strong vs. Holmes (9th C. C. A.), decided December 4, 1916, 238 Fed. 554;

The Erie Lighter No. 108, decided April 16, 1918, 250 Fed. 490;

The Aquitania, decided June 21, 1926 (citing White vs. Island Transportation Company with approval), 14 Fed. (2nd) 455;

The Salmon King, decided February 9, 1928, 1928 A. M. C. 464.

So far as the writer's search discloses, this court has never, directly or indirectly, overruled, criticized, disapproved or modified its decision establishing the rule in *White vs. Island Transportation Company*, supra.

The case of *Carlisle Packing Company vs. Sandanger*, 259 U. S. 255, 66 L. ed. 927, which respondent cites in his brief and chiefly relies upon, does not even touch the point at issue and no mention is made in that case of the decision in *White vs. Island Transportation Company*, supra, or any one of the numerous subsequent district court and circuit court decisions, which have expressly followed and enlarged upon the principle therein laid down.

We may further analyze appellant's argument as follows:

> *Point* 1. A case where there is a single claim and a single owner will not justify a petition for limitation of liability where suit in a common law court has been instituted on the claim.
>
> Point 2. Appellant in the case at bar, being a seamon, the recent passage of the Jones Merchant Marine Act, 1920, has operated to deprive the owner to bring an independent proceeding to limit its liability and to enjoin an independent suit on such claim.

Both of these points are contrary to the definite and firmly established rule pronounced by this court,

Point 1, being squarely covered by the case of *White vs. Island Transportation Company*, supra, and Point 2, having been definitely decided against appellant in the recent case of *The Edward*, 1925 A. M. C. 33, 266 U. S. 355, 69 Law ed. 324.

In an effort to support these two obsolete contentons by authority, respondent adopts the procedure of referring back to some early cases, *namely, The Lotta, Delaware River Ferry Company vs. Amos, The Eureka*, and *The Rosa*. In those earlier cases, all of which, as we have pointed out, antidate the decision of this court in the case of *White Island Transportation Company*, the courts actually hold as respondent contends. These authorities, it will be noted, however, merely take one side of the question as it existed in their day, while other decisions, notably that of *The Hoffmans*, decided May 24, 1909, 171 Fed. 455, hold to the opposite theory, as the weight of authority. All this conflict was laid at rest however, in *White vs. Island Transportation Company*, where reference is made to the then existing conflict of authority on the point in question.

Respondent attempts to revive the theory of these earlier cases which he cites, by the unsound argument that mere mention of them by this court, in the

Carlisle Packing Company vs. Sandanger case, in connection with the point that an owner, if so elected and made timely application therefor, might if it chose, claim the advantage of the limited liability statute by proper pleading in an action at law, and reference to two of these earlier overruled cases for elaboration on that point, operates as an affirmance of all that they contain and sweeps away the *Island Transportation Company* case and all recent authority by inference alone. The court in the *Carlisle Packing Company* case, was not considering, and did not decide, whether the owners had not the right to institute a proceeding in admiralty to obtain advantage of the statutory right given to it by the limitation of liability law, and its reference to two of these earlier cases did not, of course, operate to affirm or approve other points in those cases which it had previously and expressly disapproved in the Island Transportation Company case. The complete paragraph of the decision in the *Carlisle Packing Company* case, of which respondent quotes only a misleading part, reads as follows:

> "Petitioner asked an instruction that Sec. 4283 of the Revised Statute (Comj. Stat., Sec. 8021, 6 Fed. Stat. Anno. 2d ed. p. 336) applied, and that, under it, the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advan-

> tage of this section may be obtained by proper pleading. *The Lotta*, 150 Fed. 219, 222; *Delaware River Ferry Co. vs. Amos*, 179 Fed. 756. Here the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury."

In *The Edward*, supra, this court likewise squarely repudiates respondent's second contention, there holding, in no uncertain terms, that Section 33 of the Jones Merchant Marine Act did not overrule, modify or take from the owner its statutory right to limit its liability by an independent admiralty action, as in the case at bar.

For the convenience of the court, we herewith set forth a brief mention of the *majority* rule prior to the case of *White vs Island Transportation Company* in April of 1914, followed by a brief reference to that decision, and then the modern unvarying confirmation which that rule has received at the hands of numerous courts.

In the case of *The Hoffmans*, 171 Fed. 455, the court, after reviewing the principal existing decisions, held as follows:

> "If there is more than one forum in which shipowners can obtain relief under the statute, it would seem that the right of selecting the court rests with them. If they wish to proceed in an affirmative manner, they cannot do

so except in the District Courts, and they must use their machinery to secure full protection. * *

"In a case of a single claim, if there is the merest possibility of there beirg further claims, it would obviously be gross neglect on the part of a shipowner to fail to resort to limited liability proceedings, unless he was satisfied to take the chance of further litigation respecting his vessel. The only way he could fully protect himself would be by availing himself of the provisions of the statutes and the rules made in furtherance of them.

"It is well settled that a shipowner can resort to the District Courts at any time before satisfaction of judgment even after the claim or claims, has been fully litigated in the state courts. The Benefactor, 103 U. S. 239, 26 L. Ed. 351. Notable instances of a final resort to the District Court for limitation, after proceedings in a state court, are: in re Starin, and the S. A. McCaulley, supra. *If vessel owners can finally resort to the District Courts to obtain the benefits of the act, it is difficult to see why they are not entitled to at the outset and it seems unjust to require them to determine in the beginning whether or not there is more than one claim.* The machinery of the court affords the only adequate method of legally determining that fact and though it may turn out that there was but one outstanding claim and there may be some incidental hardship to a claimant, that seems to be no sufficient reason for depriving a vessel owner of his statutory right.

"I conclude that a vessel owner under the circumstances involved in the present case is entitled to resort to limitation proceedings." (Italics ours.)

To the same effect are the following:

Richardson vs. Harmon, 222 U. S. 96, 56 Law. Ed. 119;

Providence vs. Boston & S. S. Co., 130 U. S. 527; 37 Law. Ed. 1017;

Quinlan vs. Pew, 5 C. C. A. 438, 56 Fed. 111;

The S. A. McCaulley, 99 Fed. 302;

In re Starin, 124 Fed. 101.

These decisions constitute the majority rule as opposed to those authorities cited by respondent, prior to April, 1914, when this court approved them and settled the point contrary to respondent's contention.

The case of *White vs. Island Transportation Company* is so squarely on all fours with that of the case at bar, in addition to being the leading case on the question at issue, that it is almost an exact counterpart of that now presented to the court, with the single exception that the claimant was a passenger rather than a seaman. In that case a passenger on the steamer "Fairhaven," plying on Puget Sound, sustained a severe personal injury by being caught or thrown by a rod extending through the deck and connecting with the paddle-wheel of the vesssel.

> "To recover for the injury she brought an action against the Island Transportation Compnay, the owner of the vessel, in the Superior

Court for King County in the state of Washington, naming $21,350.87 as her damages. The owner then filed a libel or petition in the district court of the United States for that district to secure the benefit of the statute limiting the liability of vessel owners. Rev. Stat., Secs. 4283-4285, U. S. Comp. Stat. 1901, pp. 2943, 2944; admiralty rules, 53-57, 210 U. S. 562, Digest Sup. Ct. 1908, Vol. 6, p. 33 Appx., 29 Sup. Ct. Rep. XLV. The petition referred to the action in the state court and alleged that the damage claimant was insisting, that her injury was caused by the 'carelessness and negligence of the employees' of the owner in handling the vessel, in not furnishing the passengers with safe and proper facilities, and in not informing them of dangerous conditions. It also alleged that the claimant was injured through her own negligence, without any fault in the construction, equipment, management, control, or care of the vessel, and especially without the privity or knowledge of the owner."

The petition also prayed for the issuance of a restraining order, restraining the prosecution of the action in the state court. Thereupon:

"The claimant also moved to dismiss the proceeding for want of jurisdiction, upon the ground that the pleadings showed that the injury was attributable to negligence of the owner, and that the petition disclosed but one claim and laid no basis for apprehending the existence of others. The motion to dismiss was overruled, and an exception reserved * * *. This appeal followed, and a certificate was granted showing the grounds of the motion, the court's ruling, and the exception."

Thereafter, on these issues, which will be observed are almost identical with those of the case at bar, except the claimant was there a passenger rather than a seaman, the court holds as follows:

> "The objection that the court could not entertain the proceeding because the petition disclosed only one claim arising out of the injury is grounded upon the terms of Secs. 4284 and 4285 (U. S. Comp. Stat. 1901, pp. 2943, 2944), which require a pro rata distribution of the value of the vessel and freight when not sufficient to satisfy all claims, authorize proceedings to obtain the benefit of the statute, make the surrender of the vessel and freight for the benefit of claimants a sufficient compliance with the statute on the part of the owner, and declare that upon such surrender all claims and proceedings against the owner shall cease. It must be conceded that these sections, if taken alone, give color to the objection, for, with a single exception, their words apparently contemplate a plurality of claims. But to a right understanding of these sections, it is essential that they be read with Sec. 4283 (U. S. Comp. Stat. 1901, p. 2943). It contains the fundamental provision on which the others turn. It broadly declares that 'the liability . . . for any . . . damage . . . occasioned without the privity or knowledge of such owner . . . shall in no case exceed' the value of the vessel and freight. The succeeding sections are in the nature of an appendix, and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it. It was so held in *Butler vs. Boston & S. S. S. Co.*, 130 U. S. 550, 551, 1022, 9 Sup. Ct. Rep. 612,

where it became necessary to consider another difference in terms between them and it. In that case this court said, quoting from a decision of the Supreme Court of Rhode Island: 'These sections (4284 and 4285), if we look only to the letter, apply only to injuries and losses of property. The question is, therefore, whether we shall by construction bring the three sections into correspondence by confining the scope of Sec. 4283, to injuries and losses of property, or by enlarging the scope of the two other sections so as to include injuries to the person. We think it is more reasonable to suppose that the designation of losses and injuries in Secs. 4284 and 4285 (U. S. Comp. Stat. 1901, pp. 2943, 2944), is imperfect, a part being mentioned representatively for the whole, and consequently that those sections were intended to extend to injuries to the person as well as to injuries to property, than it is to suppose that Section 4283 was intended to extend only to the latter class of injuries, and was inadvertently couched in words of broader meaning.' In the lower Federal courts there has been some contrariety of opinion upon the point now being considered, but the prevailing view has been that due regard for the broad terms and dominant force of Sec. 4283 requires that Secs. 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one. *Quinlan vs. Pew*, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111, 120; *The S. A. McCaulley*, 99 Fed. 302, 304; *The Hoffmans*, 171 Fed. 455, 457; *Benedict Admiralty*, 4th Ed., Sec. 533. In the recent case of *Richardson vs. Harmon*, 222 U. S. 96, 56 L. Ed. 110, 32 Sup. Ct. Rep. 27, where there was but a single claim, it was assumed by both court and counsel that plurality of claims

was not essential. We think that is the true view of the statute.

"Decree affirmed."

Since the rendition of the foregoing decision holding squarely the opposite of respondent's present contention, the following authorities have further cemented this rule:

Judge Gilbert of the Ninth Circuit Court of Appeals, in the case of *Ship Owners' & Merchants' Tug Boat Co. vs. Hammond Lb r.Co.*, 218 Fed. 161, decided November 17, 1914, remarks:

> "In the court below the motion to dismiss was based on two grounds: (1) That only one claim was made against the tugs; and (2) that the amount thereof was much less than the appraised value of the tugs, and that for those reasons there was no occasion for limitation of liability, and no reason for depriving the claimant of its common-law remedy of trial by jury. On the latter ground the motion was allowed. The decision in *White vs. Island Transportation Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993, may be accepted as establishing the rule that the limited liability acts of Congress authorize a proceeding for limitation of liability 'whether there be a plurality of claims or only one.'"

Judge Chatfield, in the case of *The T. W. Wellington*, 235 Fed. 728, decided in the Eastern District of New York September 16, 1916, being a proceeding in admiralty for limitation of liability, wherein the owner

moved for restraining orders against claimant prosecuting its claim in a common law court, the restraining orders being granted, held in doing so:

> "It has also been held that limitation can be had where but one claim is presented. *White vs. Island Transp. Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993; *The Benefactor vs. Mount,* 103 U. S. 239, 26 L. Ed. 351."

Judge Learned Hand, in the case of *The George W. Fields,* 237 Fed. 403, decided in the Southern District of New York, April 12, 1915:

> *"It is now settled that a single claim will support a limitation proceeding. White vs. Island Transportation Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993. But it has been decided in the Ninth Circuit that this single claim must be greater than the value of the vessel. * * * The practical difficulty lies in knowing whether the claims actually filed are the only ones, and, if there are others, how many they are and how large. If the petition were to allege that the aggregate of all possible claims was less than the value, if the statute of limitations had run upon all claims, as suggested by Judge Chatfield in *The Defender* (D. C.), 201 Fed. 189, if the nature of the accident were such as could result by no chance in more than one claim (*Shipowners', etc., Co. vs. Hammond Lumber Co.,* 218 Fed. 161, 134 C. C. A. 575), then the petition might be open to exception, but here there is nothing of that sort. * * *
>
> "I think it clear that the petitioner should not be required at his peril to aver and prove that there are claims for more than the value of the vessel, for, if he fails, he loses his limitation,

without any assurance that there may not be others, which he may not know. If the rule has any application, it must be limited to cases where the aggregate of the claims appears beyond any question, either from the petition or elsewhere. If the affidavit may be considered on this application, it is far from making the necessary proof." (Italics ours.)

Judge Learned Hand again, in the case of *The Tug No. 16*, 237 Fed. 405, decided in the Southern District of New York, November 14, 1916:

"It has now been finally decided that a single claim is enough to sustain the petition (*White vs. Island Trans. Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993), contrary to the early impression in this district (*The Rosa* (D. C.) 53 Fed. 134), and it may be urged that, since the limitation could be effectively enforced by a state court, where there was only a single claim, that case should be taken as holding that the petition lies, even when the single claim is less than the value of the vessel. Yet in *White vs. Island Transportation Co.*, supra, the claim was larger than the value, and all that the case necessarily decides is that the shipowner in that event has his option of forums; it need not be taken to decide that, where there is no need of any limitation at all, he may enjoin the usual common-law remedies, which are, indeed, preserved by the statute."

Judge Rudkin, speaking for the Circuit Court of Appeals, Ninth Circuit, in *Strong vs. Holmes*, 238 *Fed.* 554, decided December 4, 1916:

"Admiralty Rule 57, as amended and promulgated April 22, 1889 (130 U. S. 705, 29 Sup. Ct. XLVI), provides as follows:

"'The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer to any such embezzlement, loss, destruction, damage or injury, or, if the ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship has already been libeled and sold, the proceeds shall represent the same for the purpose of these rules. * * *

"The facts upon which the jurisdiction depends in this case are as follows: Certain piles of lumber on the steamship Alki toppled over on a voyage from the city of Seattle to Juneau, Alaska, on the 31st day of March, 1912. *A personal action was thereafter brought in the Superior Court of King County, State of Washington, against the appellant, as owner, to recover damages for the loss and injury occasioned thereby.* A judgment was recovered in that action in the sum of $21,250. Thereafter a suit was instituted on the King County judgment against the appellant in the court below, and in that suit a second judgment was recovered, upon which the appellee is now

threatening to issue an execution. It will thus be seen that the jurisdiction of the court below depended upon the question whether the suit on the King County judgment in the Alaska court was a suit in behalf of the loss or injury resulting from the toppling over of the lumber within the meaning of Rule 57. We think that it was.

"'In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance. But if it is administered with tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.' *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 385 (27 L. Ed. 1038). * * *

"It is also urged that there is only one claimant, and that the value of the vessel is greatly in excess of his claim; *but the fact that there is but one claim is immaterial. White vs. Island Transportation Co.*, 233 U. S. 346, 36 Sup. Ct. 589, 58 L. Ed. 993." (Italics ours.)

Judge Haight, in *The Erie Lighter No.* 108, 250 Fed. 409, decided in the District of New Jersey April 16, 1918:

> "This is a proceeding, instituted pursuant to Admiralty Rules 54-57 of the Supreme Court (29 Sup. Ct. XXXI, XXXII), to procure the benefits of the limitation of liability provided for in sections 4283-4289 of the Revised Statutes, as amended by the Acts of June 26, 1884, and June 19, 1886 (23 Stat. L. 57; 24 Stat. L. 80; U. S. Comp. Stat. 1916, Secs. 8021-8028). *There is but one claimant. The claim is based on personal injuries which resulted in death.* Several jurisdictional questions were disposed of when the matter was previously before the court on exceptions to the petition. The additional questions which have arisen on final hearing can be better stated after the general facts have been outlined. * * *
>
> "This is an important consideration, as a great many limited liability cases, since the decision in *White vs. Island Transp. Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993, deal only with a single claim arising out of personal injury. * * *
>
> "Nor is there any evidence from which his privity or knowledge that there had been any neglect in respect to inspection could be inferred. It follows therefore that, if the petitioner is liable for the injuries which resulted in the decedent's death, it is entitled to limitation of its liability. * *
>
> "A permanent injunction against the claimant proceeding against the petitioner in the state courts of New Jersey or otherwise, to recover damages for the decedent's death, will be awarded the petitioner. Costs will not be allowed either party, as each has been partially successful in these proceedings." (Italics ours.)

Judge Augustus N. Hand, in the case of *Aquitania*, 14 Fed. (2nd) 456, decided in the Southern District of New York June 21, 1926, while therein holding that the petition would not lie because the value of the vessel was many times in excess of any possible claims, nevertheless affirmed the doctrine of the preceding cases:

> "If the decision of the Circuit Court of Appeals of the Ninth Circuit in *Shipowners' & Merchants' Tugboat Co. vs. Hammond Lumber Co.*, supra, is sound law, the Limitation Act, in view of the decision of the Supreme Court in *White vs. Island Transportation Co.*, 233 U. S. 346, 34 S. Ct. 589, 58 L. Ed. 993, must be primarily founded, not upon the avoidance of a multiplicity of action, but a possibility at least that the liability of the owner may exceed the value of the vessel and her pending freight. In *White vs. Island Transportation Co.*, supra, the single claim proved was greater than the value, and upon such a state of facts, the proceeding was allowed."

See also the very learned discussion by Judge Cochrane in *Re Louisville & Cincinnati Packet Company*, 223 Fed. 185, decided in the Eastern District of Kentucky, April 3, 1915, the court therein denying claimants' motion to dismiss the petition for limitation of liability upon the filing of which the state court action had been enjoined.

The contentions which respondent raises in this case are so patently untenable that it is not really

necessary to refer to decisions to illustrate their fallacy, the statutory enactment and the rules of court being sufficient to dispose of the matter.

In *Norwich & New York Transportation Co. vs. Wright* (decided in 1871), 13 Wall. 107, 20 U. S. (L. Ed.) 585, Justice Bradley laid the foundation for present Admiralty Rule 51, observing in the course of his discussion the following:

> "The Act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties ,or any of them, may take 'the appropriate proceedings in any court, for the purpurpose of apportioning the sum of which, etc.' Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel or other fund is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition, to present and substantiate their respective claims, and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State Courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this

court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding."

"* * * * * *

"*The proper course of proceeding for obtaining the benefit of the Act would seem to be this:*

"When a libel for damage is filed, either against the ship *in rem* or the owners *in personam*, the latter (whether with or without an answer to the merits) *should file a proper petition* for an apportionment of the damages according to the statute and should pay into court (if the vessel or its proceeds is not already there) or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. *Having done this*, the ship-owner *will be entitled to a monition* against all persons to appear and intervene *pro interesse suo, and to an order restraining the prosecution of other suits. If an action should be brought in a State Court the ship owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State Court or procure an order from the District Court to restrain the further prosecution of the suit.* The court having jurisdiction of the case, under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day." (Italics ours.)

See also:

The Great Western (1886), 118 U. S. 520, 30 U. S. (L Ed.) 156;

Monongahela River Consol. Coal, etc., Co. vs. Hurst (C. C. A. 6th Circuit 1912), 200 Fed. 711.

It will be noted that in the *Norwich* case, *supra*, the Court lays down the mode of procedure which petitioner has followed in this case. Thereafter, as Justice Bradley stated, the Supreme Court did promulgate the rules of procedure, it being especially directed to the court's attention that under Admiralty Rule 51, entitled "Limitation of Liability—*How Claimed*," this court has used the following mandatory language:

> "* * * and, upon compliance with such order (either an order for appraisement or surrender of the vessel), the said court *shall issue* a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court * * * and the said court shall also, on the application of the said *owner or owners, make an order to restrain the further prosecution* of *all* and *any suit or suits against said owner or owners in respect to any such claim or claims.*" (Italics ours.)

As was said in the case of *The Scotland*, 105 U. S. 24, 26 L Ed. 1001:

"Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceeding was necessary to enable shipowners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the laws of limited responsibility, and where they were subjected to be liable to actions for damages at the suit of the parties thus injured. *The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in such case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt.* (Italics ours.)

And as was said by Judge Cochran, of the Eastern District of Kentucky *in re Louisville & Cincinnati Packet Co.*, 223 Fed. 185:

"The requirement, however, is that in such contingency the libel shall be filed and the proceeding had in the District Court of any district in which the owner or owners, may be sued; *not the same court in which the suit has been brought, but in the court of admiralty for the same district.*

"* * * * *

"* * *If the vessel has been libeled the proceeding is to be had in the *same court.* If it has not been libeled, but the owner has been sued in the same district in which the vessel then is, then it is to be had in the *admiralty* court of that dis-

trict. If the vessel has not been libeled, and the owner has been sued in another district than the one in which the vessel then is, the proceeding is to be had in the *admiralty court* of the district in which the vessel then is. The rule in its distribution of the jurisdiction of such proceeding was thus brought into entire harmony with the general principles of jurisprudence." (Italics ours.)

Benedict on Admiralty, Fifth Edition, Vol. I, Par. 489, states the rule thus:

"The proceeding of a shipowner, in limitation of his liability, is to be taken in the District Court, sitting in admiralty. (*Norwich & N. Y. Transp. Co. vs. Wright*, 80 U. S. (13 Wall.), 104, 20 L Ed. 585; *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 27 L Ed. 1038, 3 Sup. St., Rep. 379, General Admiralty Rule 54.) In *Elwell vs. Geibi* (*Elwell vs. Gebei*, 33 Fed. 71, a proceeding in equity but wrongly reported as in admiralty; *Goodrich Transp. Co. vs. Gagnon*, 36 Fed. 123), the complainant sought the aid of the Circuit Court, sitting in equity, for the relief given by the statute, but the court held that it was not the proper forum in which to obtain the relief asked. In *The Mary Lord* (31 Fed. 416), a vessel was held liable in the District Court, and, after appeal to the Circuit Court and affirmance, the shipowner filed in the latter court his petition for limitation; it was dismissed, the court holding that the petition should have been filed in the District Court. General Admiralty Rule 55 provides that the rules and regulations governing causes in limitation of liability shall apply to the Circuit Courts of Appeals of the United States, where such causes are or shall be pending in said court on appeal from the District Court."

And in Par. 480:

"The monition which issues when the vessel has been surrendered, or when a stipulation has been entered into to pay the value into court, requires every person to assert his claim in the limitation proceeding, which is in its very nature exclusive of separate suits against the owner of the ship by "reason of his ownership. (See, however, *ante*, No. 474, relative to claims not subject to limitation.) The issuance of an injunction is not necessary to stop proceedings in separate or independent suits upon such claims, though the power to grant an injunction exists, when necessary to maintain the exclusiveness of the jurisdiction, and a restraining order is usual. The nature of the proceedings and the issuance of monition have the effect of a statutory injunction. (The *San Pedro*, 223 U. S. 365, 56 L. Ed. 473, 32 Sup. Ct. Rep. 275; *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 27 L. Ed. 1038, 3 Sup Ct. Rep. 379; *The Tolchester*, 42 Fed. 180; *In re Old Dominion S. S. Co.*, 115 Fed. 845; *In re Whitelaw*, 71 Fed. 733; *Dowdell vs. U. S. District Court*, 139 Fed. 444; *Societe Naphthes Transports vs. Bisso Towboat Co.*, 241 Fed. 463, certiorari denied 245 U. S. 652, 62 L. Ed. 532, 38 Sup. Ct. Rep. 11. We may consider *The Lotta*, 150 Fed. 219, overruled, *In re Oceanic Steam Nav. Co.*, 204 Fed. 260, the restraining order was modified so that, while staying the prosecution, it permitted the formal commencement of suits by death claimants in order that such suits might not be barred if the petitioner's liability were not limited and the court's power to adjudicate the claims while dismissing the petition were not sustained. And the court, in limitation proceedings begun after verdict but before judgment in a state court, may allow the state court proceedings to go to

judgment for the purpose of establishing the amount to which the limitation is to be applied: (*Davenport vs. Winnisimmet Co.*, 162 Fed. 862, certiorari denied 212 U. S. 576, 53 L. Ed. 657, 29 Sup. Ct. Rep. 684.) Pending the determination of the limitation proceeding, however, actions before begun upon the claims are but suspended and security given therein is not vacated by the institution of the limitation proceeding nor will the court vacate such security, if both proceedings are before it (*Huasteca Petroleum Co. vs. Cia de Navegacao Lloyd Brasileiro*, 297 Fed. 318, reported *sub nom. The Pelotas*, 1924 A. M. C. 286), unless its discretion is moved by special considerations (*Societe Napthes Transports vs. Bisso Towboat Co.*, 241 Fed. 463.)

"One of the purposes of the Limited Liability Act is to bring about the settlement in one proceeding of all claims arising from a common disaster. (*Butler vs. Boston, etc., S. S. Co.*, 130 U. S. 527, 32 L. Ed. 1017, R. Sup. Ct. Rep. 612; *Dowdell vs. U. S. District Court*, 139 Fed. 444; *In re Pac. Mail S. S. Co.*, 130 Fed. 76, certiorari denied, 195 U. S. 632, 49 L. Ed. 353, 25 Sup. Ct. Rep. 790; *Oregon R. & Nav. Co. vs. Balfour*, 90 Fed. 295, appeal dismissed, 179 U. S. 55, 45 L. Ed. 82, 21 Sup. Ct. Rep. 28. In limitation proceedings the power of the admiralty court is similar and as extensive as the power of chancery court in an equity proceeding); *Oregon R. & Nav. Co. vs. Balfour*, 90 Fed. 295, appeal dismissed 179 U. S. 55, 45 L. Ed. 82, 21 Sup. Ct. Rep. 28. Scope of issues adjudicated, see *The Adah*, 245 Fed. 378, affirmed 258 Fed. 377.) Such a proceeding is in its very nature a consolidation of actions (*Boston Marine Ins. Co. vs. Metropolitan Redwood Lumber co.*, 197 Fed. 703, 714.)"

Not only is the admiralty court the only proper or permissible place in which to file a limitation of liability proceeding, but it is equally well settled that having once thus secured jurisdiction, that jurisdiction becomes absolutely exclusive. To quote further from Benedict, Sec. 510:

> "As we have explained above, where proceedings are regularly taken and monition duly issued, the jurisdiction of the court to hear and determine every claim becomes exclusive and it is the duty of every other court, Federal or State, to stop all further proceedings in separate suits upon claims to which the Limited Liability Act applies, nor is the issuance of an injunction necessary to stop proceedings in separate or independent suits upon such claims but the very nature of the proceeding and of the monition has the effect of a statutory injunction. (*The San Pedro*, 223 U. S. 365, 56 L. Ed. 473, 32 Sup. Ct. Rep. 275.) Power to grant an injunction exists, however, under Revised Statutes No. 4285, where necessary to maintain the exclusiveness of the jurisdiction, and General Admiralty Rule 51 provides, as in the matter of the monition, that 'upon compliance with' the other for payment into court of the appraised value or the giving of security therefor or upon surrender to a trustee, the court shall, upon application, make an order restraining the further prosecution of all and any suits against the owner in respect of any claims arising out of the damage or loss in question. This must be deemed to be the general restraining order which not only stays the further prosecution of suits already begun but also forbids the institution of other suits. As a matter of law there would not seem to be necessity for haste in the issuance of the injunction but as a matter of

practically securing compliance with the law the restraining order should be procured at once. In order to have the injunction not merely legally effective but actually obeyed, it is the practice of some proctors to procure not only a general restraining order incorporated in the order directing a monition to issue but also, at the same time, to secure a special restraining order designating the specific suits or actions which have been instituted and which are to be stayed. This additional order is in no sense necessary, and, academically considered, adds nothing, but its service compels the ignorant and obstinate to pay immediate heed. An injunction will set aside the attachment of a sheriff or stay an action about to be brought to trial in a State court (*Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S. 578, 27 L. Ed. 1038, 3 Sup. Ct. Rep. 379. The case of *Knowlton vs. Providence & N. Y. S. S. Co.*, 53 N. Y. 76, was not referred to in the above case, but must be deemed overruled. See also *In re Whitelaw*, 71 Fed. 733), or in a Federal Court at commn law (*Sees's Adm'x vs. Monongahela River Consol. Coal & Coke Co.*, 155 Fed. 507.

"In *In re Norwich and New York Transportation Company* (10 Ben. 193, Fed. Cas. No. 10361), it was held that the injunction would not restrain attorneys in actions already begun in other courts, from collecting their costs in these actions. The late practice, however, is for the District Court to compel the payment of such costs by providing for their payment in the final decree granting the limitation."

The City of Boston, 159 Fed. 261.

Respondent's theory is, therefore, not only contrary to *all* authority, but, as we have pointed out, is

contrary to the rules and expressed language of the statute.

Section 4285 R. S. provides that after transfer to the trustee

> "from and after which transfer all claims and proceedings against the owner shall cease."

This prohibition against the maintenance of any other action obtains with equal force where in lieu of the surrender of the vessel stipulation has been entered into as provided by admiralty Rule 54, in the *San Pedro* (1912), 223 U. S. 365, 56 U. S. (L. Ed. 473), the Supreme Court having expressly held:

> "The view we take of the statutory injunction declared by Section 4285, and of its application to cases where the vessel has been surrendered and a stipulation entered into as a proceeding tantamount to a transfer of the ship as authorized by Section 4285, is fully supported by the leading case of *Providence etc. Steamship Co. vs. Hill Mfg. Co.* (1883), 109 U. S. 578, 594, 599, 600 and 601 (3 S. Ct. 379, 617, 27 U. S. [L. Ed.] 1038). That was a suit in a state court againts the owner of a steamship to recover for goods lost by the burning of a steamer. While the suit was pending the owner filed his petition in the proper District Court for the benefit of the limited liability statute. The proceedings seem to have been conducted in accordance with admiralty Rule 54, *but in addition the petitioners made application as permitted by that rule, for an order restraining the prosecution of 'all and any suits' against the owner* in respect of claims subject to the provi-

sions of the Act. The owner and defendant in the suit pending in the state court thereupon, by plea, set up the limited liability suit as a reason why the state court should proceed no further. This was overruled. Later the defendant therein pleaded the final decree in the liability suit as a bar to any decree in the state court against him, as owner. This, too, was disregarded and a decree rendered against the owner for the claim for damages caused by the burning of the steamer and the plaintiff's goods. This was affirmed in the Supreme Judicial Court of Massachusetts and brought here upon a writ of error. After a consideration of the meaning and purpose of the Limited Liability Act of 1851 (March 3, 1851, 9 Stat. 633, c. 43), sections 4283, 4284 and 4285, Revised Statutes, and of admiralty Rule 54, the court said (p. 594): 'We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the Act of 1851, without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose.' Later the court added (pp. 599, 600): 'Proceedings under the Act having been duly instituted in this court it acquired *full jurisdiction of the subject matter;* and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed and issued its monition to all parties to appear and present their claims, *it became the*

duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims . . . The operation of the Act in this behalf, cannot be regarded as confined to cases of actual transfer (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested.' "

To the same effect see: *The Amsterdam*, 23 Fed. 112, and *The Tolchester*, 42 Fed. 180.

Likewise, in harmony with the express language of the statute is admiralty Rule 53, which provides *inter alia*, as follows:

> "*In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability*, or the liability of said ship or vessel for said embezzlement, loss, etc." (Italics ours.)

and not be forced to try out the question of liability before a jury in some other court as respondent would have it.

As a final word in answer to this theory of respondent, which is really not an open question at all, we would refer to the language of Judge Purnel in *In re Old Dominion S. S. Co.*, 115 Fed. 845:

"The argument that this suit (the liability proceedings in the admiralty court) should be left open until the same can be tried in the Circuit Court and the question of negligence passed on by a jury is without force. The jurisdiction of this court in such cases is ample and complete—*it is absolute.*" (Italics ours.)

Contemporaneously with the case at bar there was pending before the trial court the case of *The Salmon King*, decided February 9, 1928, and reported 1928 A. M. C. 464, in which were raised almost the identical issues herein presented to the court, and which was briefed and argued by the writer on behalf of the petitioner in that case.

For the convenience of the court, as well as to furnish a concise and authoritative summary of the foregoing discussion, we herewith set forth the text of the last mentioned decision:

"The petitioner seeks to limit liability for injury sustained by a seaman. An action was commenced in the state court by the injured seaman, and the state court proceeding was enjoined in this proceeding. The claimant now appears and moves the dissolution of the restraining order and that the limitation proceeding be dismissed, for the reason that the state court has jurisdiction; that there is only one claimant and one owner, that the exemption may be claimed in the state court by proper pleading, *Carlisle Packing Co. vs. Sandanger,* 259 U. S. 255, and that by this proceeding he is denied the right of trial by jury pursuant to

Sec. 9, Judiciary Act, 1789, and Sec. 33 of the Merchant Marine Act, 1920.

"NETERER, D. J.:

"Claimant cites in support of his motion, *Carlisle Packing Co. vs. Sandanger, supra; Lotta*, 150 Fed. 219; *Delaware River Ferry Co. vs. Amas*, 179 Fed. 756; *Eureka No. 32*, 108 Fed. 672; *Rosa*, 53 Fed. 132; *Great Western*, 118 U. S. 520; *Scotland*, 105 U. S. 24; and *Bolikow; Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 1927 A. M. C. 402, 273 U. S. 207, in which Chief Justice Taft said, at pages 406-7:

" 'The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy and is applicable to proceedings in *rem* against the ship as well as to proceedings in *personam* against the owner, the limitation extending to the owner's property as well as to his person.'

"This was an action to recover on a stipulation given in lieu of the vessel. At page 408, the Chief Justice further said:

" 'Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide all the issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law.'

"And enforced the liability upon the *ad interim* stipulation. At bar it was admitted that this court acquired jurisdiction by filing of the petition.

"This court has uniformly, since *White vs. Island Transp. Co.*, 233 U. S. 346, entertained jurisdiction to limit liability where there was a single claimant or a single owner. The Supreme Court in *White vs. Island Transp. Co., supra*, held that R. S. 4283 broadly declares that liability for any damages occasioned without the privity or knowledge of the owner, shall not exceed the value of the vessel and pending freight, and that the succeeding sections relate to procedure, and that plurality of claims is not essential.

"The Court of Appeals of the Circuit, in *Shipowners' & M. T. Co. vs. Hammond Lbr. Co.*, 218 Fed. 161, held that the rule is established by the *White* case, *supra*, that the limited liability act of Congress authorized a proceeding for limitation of liability 'whether there is a plurality of claims or only one.'

"Circuit Judge Learned Hand, in the *George W. Fields*, 237 Fed. 403, said:

"'It is now settled that a single claim will support a limitation proceeding.'

Circuit Judge Rudkin for the court in *Strong vs. Holmes*, 238 Fed. 554, said:

"'The value of the vessel, or that there is but one claimant, is immaterial.'

"To the same effect are T. W. Wellington, 235 Fed. 728; Tug No. 16, 237 Fed. 405; Erie Lighter No. 108, 250 Fed. 490; and Acquitania, 1926 A. M. C. 1071, 14 F. (2d) 456.

"Several of the cases cited by the claimant have been expressly disapproved. That liability may be limited where there is a single claim and a single owner as against a common law action, is

stare decisis. The right asserted to a common law action and a jury trial has likewise been determined against the claimant's contention in this court, *Victoria,* 1926 A. M. C. 1096, 3 F. (2d) 330, and by the Supreme Court, *Edward; In Re East River Towing Co.,* 1925 A. M. C. 33, 266 U. S. 355. In the *Edward* the Circuit Court of Appeals of the 2nd Circuit certified to the Supreme Court two questions (1923 A. M. C. 700):

" '1. If an action at law be brought such as is described in Merchant Marine Act 1920, Sec
33 (41 Stat. 1007), can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

" '2. Has Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of shipowners, so far as claims or suits based on personal injuries to or death of seamen are concerned?

"And the court held that an action at law under Sec. 33 of the Merchant Marine Act to recover damages for the death of a seaman form personal injuries suffered in the course of his employment, is subject to the injunction provided for by Admiralty Rule 51, Admiralty Rules of Practice, 254 U. S. 25, in aid of limitation of liability proceedings; and in answering the second question held that Sec. 33 of the Merchant Marine Act did not impliedly repeal the statute regarding limitation of liability of the shipowner, so far as claims or suits based on personal injuries to or death of the seamen are concerned.

"At page 35, in *Edward, supra:*

" 'The starting point is that the later act determines the extent of the seaman's substantive rights and the measure of damages, *Alliance;*

Panama R. R. Co. vs. Johnson, 1924 A. M. C. 551, 264 U. S. 375, 391 * * *. If there is no surrender of the ship, which we presume is made relatively rarely, the limited liability statutes play no part. Section 33 has no relation to means of collection but only to principles of liability and the ordinary course of trial. Naturally therefore the limited liability laws are not mentioned in the list of statutes repealed in Sec. 2; yet there can be no doubt that those laws would apply unless repealed. No sufficient reason is offered for the extraordinary preference over other claims that would be given to seamen where the decree of the District Court sustained. When a preference in respect to seamen's wages was intended it was expressed * * *. On the other hand it has been laid down with reference to this same Sec. 33 that an intention to depart from a policy deliberately settled in a general statute is not lightly to be assumed * * *. The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles, not as a basis for meticulous discovery of conflict with an established system in matters of detail. The choice of a jury trial is given in matters of detail. The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up.'

"The contention that the suit continue in the state court and the question of negligence and amount of damages be passed on by a jury, and the right of limitation continue in this court, would confound the issue and lead to interminable confusion. A divided jurisdiction could serve no useful purpose. State courts are impotent to administer the limitation act. Admiralty Rule 54 fixes liability procedure in the district court. Under Admiralty Rule 53 the owner is at liberty

to contest his liability. Under Admiralty Rule 51 the district court on application shall make an order to restrain the further prosecution of suits against the owner in respect to such claim or claims, and upon surrender of the vessel 'from and after which transfer, all claims and proceedings against the owner shall cease.' R. S. 4285; and of equal force, in lieu of surrender, is a stipulation entered under Admiralty Rule 54, San Pedro, 223 U. S. 365.

"State courts have not the requisite jurisdiction, and in the language of Justice Bradley, in *Norwich & N. Y. Transp. Co. vs. Wright,* 80 U. S. 104, 'no court is better adapted than a court of admiralty to administer precisely such relief.'"

WHEREFORE, it is respectfully submitted that the decree of the Circuit Court of Appeals for the Ninth Circuit should be reversed, with directions to affirm the decree of the District Court.

Respectfully submitted,

H. B. JONES,

ROBERT BRONSON,

Proctors for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. [redacted] 38

AXEL LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," HER ENGINES, ETC., PETITIONER

vs.

WINFIELD A. GREEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WINTER S. MARTIN,
2014 Smith Tower,
Seattle, Washington
and
SAMUEL B. BASSETT,
511 Alaska Building
Seattle, Washington
Proctors for Respondent.

(34,748)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 617

AXEL LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," HER ENGINES, ETC., PETITIONER

vs.

WINFIELD A. GREEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF FACTS

This court granted certiorari to review the decree of the Circuit Court dismissing, for want of jurisdiction, the petition of a ship owner to limit his liability under Section 4283 et seq, Revised Statutes; 46 U. S. C. A. Section 183.

The respondent commenced an action against the petitioner in the State Court, under the Merchant Marine Act of 1920, Sec. 33, Chap. 250; 41 Stat. at L. 988; U. S. C. A. Title 46, Sec. 688, alleging that while in the employ of the petitioner as a seaman and fisherman, he sustained injuries proximately caused by the *personal* negligence of the petitioner and defective appliances and equipment of his halibut vessel "Aloha."

The petitioner appeared in said common law action and filed an answer therein denying the allegations of negligence, and pleading two affirmative defenses: assumed risk and contributory negligence. The affirmative matters of the petitioner's answer were controverted by the respondent's reply, and the case thereupon being at issue the respondent demanded a jury trial and the cause was assigned for trial for the 6th day of February, 1928. Thereafter on the 4th day of February, 1928, two days before the trial date, the petitioner instituted this proceeding in the District Court, and an injunction thereupon is-

sued restraining the further prosecution of said action in the State Court. The monition of the District Court, which followed, was in the usual form directing all claimants to appear and file their claims, if any they have, on or before a day certain at the office of the United States Commissioner. The time for filing claims having expired, the Commissioner reported to the District Court that the only claim filed was that of Winfield A. Green, the respondent here (R. 19), and thereupon an order of default was entered against all other claimants. (R. 33.)

The claimant thereupon moved to dissolve the restraining order and to dismiss the petition on the ground that the petitioner was the sole owner of the vessel "Aloha" and there was only one possible claimant. (R. 19.) The District Court denied the motion, allowing an exception (R. 35); and thereafter the respondent filed an answer to the petition denying the material allegations thereof and alleging among other things that his accident and injury was the proximate

result of the *petitioner's personal negligence and with his actual knowledge and privity.* (R. 37, 39, 41.)

After the cause had been assigned for trial, and before the hearing, the respondent filed written exceptions to the petition on the grounds that the facts averred therein were insufficient to entitle the petitioner to a limitation of his liability and that the petition showed on its face that the District Court was without jurisdiction. (R. 36.)

The petition to limit liabilitty and for exemption from all liability was in the customary form except for one notable omission, viz.: THE PETITION CONTAINED NO ALLEGATION THAT THE PETITIONER WAS "*WITHOUT PRIVITY OR KNOWLEDGE*" OF THE FACTS UPON WHICH LIABILITY WAS PREDICATED.

This omission was not inadvertent, for the petitioner, Axel Langnes, was admittedly the sole

owner and master of the "Aloha," and the situation then and there alleged to support liability was of his own making. He was privy to and had personal knowledge of every essential fact and circumstance upon which liability was predicated. (R. 57-64.) He could not, with any regard for the truth, have alleged to the contrary and therefore did not attempt to do so. The District Court overruled exceptions to the petititon and proceeded to hear the evidence. (R. 47.)

The petitioner, Captain Langness, thereupon took the stand as a witntess in his own behalf and testified substantially as follows, *touching his right to a limitation of liability*:

> I am the sole owner of the diesel halibut vessel "Aloha" which is 52 feet long and weighs 28 tons gross. At the time of the accident in question she carried a crew of five men, including myself. The accident to Winfield A. Green, the claimant, occurred on May 13, 1927, and as a result, Green commenced an action in the State Court seeking to recover the sum of Twenty-five Thousand Dollars ($25,000.00) damages for the loss of his eye. The "Aloha," at the time of the accident, was seaworthy in every respect. *I was captain and master of the vessel and on board when the accident occurred. The fishing was done under my personal direction. I*

instructed the men how to handle the fishing gear and where and when to fish. I was personally present when the accident to Green occurred and saw it. Green was in the performance of his duties when he was injured. While he was hauling in the ground line, one of the hooks caught in the side of the vessel and sprung back, striking him in the eye. *Before the accident a portion of the side of the vessel from which the fishing was done, was covered with sheet iron plate to keep the hooks from catching in the side of the vessel, and after the accident the sheet iron plate was extended to cover the back stay irons which were along the side of the vessel in the vicinity of the roller, to keep the hooks from catching on them when the ground line was hauled in.* (R. 49-64.)

The petitioner thereupon rested his case as to his right to a limitation of liability, and thereupon the respondent moved to dismiss the petition on the ground that the evidence failed to show that the matters upon which liability was predicated, were without the privity or knowledge of the petitioner, but that on the contrary, the evidence was conclusive, that the petitioner was privy to and had actual knowledge of said matters. (R. 66.) *The District Court refused to hear argument on the motion and ruled that he would first determine the question of general*

liability and required the respondent to prove the merits of his claim, to which ruling the respondent excepted and exception was allowed. (R. 66-67.)

The respondent thereupon took the stand as a witness in his own behalf and testified substantially as follows, touching the merits of his claim:

> I was employed by Captain Langness for a fishing voyage, and our compensation was determined by the size of the catch. I was employed as an engineer and fisherman. On the second day after we commenced fishing, May 13, 1927, I was injured. *The hooks were repeatedly catching on the back stay or chain irons, which were located close to the roller over which the ground line was hauled in. I complained to Captain Langness, telling him that I was afraid of the back stay irons, which were not covered with anything to prevent the hooks from catching on them.* (R. 73, 75.) In response to my complaint, Captain Langness said it was all right—to use both hands in hauling in the gangions to which the hooks were attached and to pull hard so as to get plenty of slack. (R. 74.) In obedience to the captain's order, I began forcing and pulling harder on the gangions. Before I adopted this method the hooks had caught when the gangions were half way over the roller, but the one that injured me caught when it was only one-third of the way over the roller. (R. 76.) At that time,

Captain Langness was not heading the vessel so as to keep the line aft. It was coming up over the roller forward; that is, from the direction of the back stay irons upon which the hooks had been catching. (R. 77.) If the vessel had been headed in a direction so as to keep the ground line aft, there would be less danger of the hooks catching on the back stay irons. (R. 77.) A hook caught on the side of the vessel in the direction of the back stay irons and when torn loose by the power winch, sprung back and struck me in the eye before I could jump out of the way. (R. 76, 78.) I examined the hook when it was removed from my eye and it had been sprung about one-quarter of an inch. (R. 78.) I also examined the back stay irons upon which the hooks were continually catching and found that they had been gouged and cut up by the hooks. (R. 101.) I have been in the halibut fishing business for about twenty years, and in my experience it is customary to cover the side of the vessel from which the fishing is done with an iron or zinc plate to keep the hooks from catching and springing back into the faces of the fishermen. (R. 75-76.) I didn't know that these irons had not been covered by such a sheet metal before we started fishing. (R. 102.)

Upon the conclusion of the respondent's evidence, the petitioner challenged its sufficiency on the question of total exemption (R. 138), and the respondent renewed his motion as to the pe-

titioner's right to limit liability. (R. 138-139.) The Court ruled again that he would first determine the quetsion of liability on the merits, and, finding none, dismissed the claim, *utterly ignoring the basic jurisdictional requirement that, in order to maintain such a proceeding, the petitioner shall be without privity or knowledge of the essential facts upon which liability is alleged to exist.* (R. 139.)

The Questions Presented

On appeal to the Circuit Court the claimant, Green, raised two questions:

> First: When a seaman has commenced an action against the owner of a vessel in the State Court, pursuant to Section 33 of the Merchant Marine Act of 1920, to recover damages for personal injuries, *and there is only one possible claimant and a single owner*, must the owner, if he desires to take advantage of the Limited Liability Act, do so by proper pleading in his answer to the complaint, or may he elect to institute an independent proceeding in a Court of Admiralty and thereby deprive the seaman of his right to trial by jury?
>
> Second: May a ship owner avail himself of the Limited Liability Statute when the

> matters and circumstances upon which liability is alleged to exist, are *with* the actual privity and knowledge of the owner?

The Circuit Court decided the first question against respondent's contention, holding that a ship owner was not obliged to take advantage of the Limited Liability Act by way of an answer to the respondent's action in the State Court, but had a right to file a libel in the United States District Court, *even though there be but one possible claimant and a single owner.*

On the second question, however, the Circuit Court agreed with respondent, that over his objection, the District Court had no jurisdiction to proceed when it appeared that the owner was personally present at the time of the accident and had full knowledge of the facts and defective condition of the ship upon which the claimant's charge of negligence was based. On this point the Circuit Court held:

> "There is, therefore, no basis for the limitation of the liability of the owner upon a claim of negligence based upon the failure to cover the chain plates with sheet metal because of his ignorance, for he had full knowledge thereof. That being true the Court had no jurisdiction to proceed and pass upon the

> merits of the case or to determine whether or not such failure was negligence, in the absence of the consent of the injured party, who had elected to bring his action at law in the Superior Court of the State of Washington and who made timely objection to the trial of the question of negligence, contributory negligence and assumed risk, and other defenses. The objection of the appellant to the jurisdiction of the Court should have been sustained and the Court should have declined to pass upon the merits of the appellant's claim. Upon ascertaining that the owner was charged with knowledge and privity the proceedings should have been dismissed for lack of jurisdiction and the appellant allowed to proceed in the state court." (Opinion, R. 180-181.)

In this court the petitioner now claims that the foregoing holding of the Circuit Court was error. In his brief he urges five specifications of error, all of which relate to this single question. In the following brief we will not attempt to argue separately each "erorr" as specified by the petitioner, but, because they all relate to the same question we will argue them together.

Inasmuch as the entire record is before this court for review we will also argue under Subdivision II of the following brief, the first ques-

tion hereinabove stated which was decided by the Circuit Court adversely to the respondent's contention.

ARGUMENT

I.

The evidence being undisputed that respondent's injury occurred with the "privity and knowledge" of the owner, the District Court had no jurisdiction to adjudicate the merits of the claim.

The petitioner failed to plead or prove that the facts and matters relied upon by the claimant to establish liability, were without his "privity or knowledge," and in the absence of such allegations and proof he is not entitled to a limitation of liability under the express terms of the statute, and the District Court was therefore without jurisdiction to adjudicate the merits of respondent's claim. It is well settled that the District Court will first determine whether or not the ship-owner is entitled to a limitation of his liability and that this depends upon whether or not the matters upon which liability is alleged to exist were without his "privity or knowledge." If the Court finds that the owner is entitled to a

limitation of his liability, which is a finding that the Court has *jurisdiction* of the cause, it will then proceed to determine the question of general liability. But if the evidence shows that the facts and matters out of which the accident or disaster arose, were *with* the "privity or knowledge" of the owner, the owner is not entitled to a limitation of his liability and the Court is without jurisdictiton to go further and determine the merits of the claim.

In *Quinlan vs. Pew*, 56 Fed. 111 (C. C. A. 1st), the Court said, at page 114:

> "If the owners are not entitled to a limitation of liability as against Quinlan, then, inasmuch as the only claim appearing is his, they must be reversed. We understand that the expressions in Butler vs. Steamship Co., 130 U. S. 527, 552, 9 Sup. Ct. Rep. 612, are not inconsistent with this proposition, and that they merely hold that a District Court has jurisdiction to entertain a cause for limited liability for the very purpose of examining whether or not the misfortune was without the privity or knowledge of the owner. It seems to us that, if the District Court finds they are not entitled to the benefit of the statute, it has no power to bar the claimant from any portion of his demand, and, especially when there is no other apparent claim,

> the proceeding must be dismissed, to enable him to prosecute the owners in such tribunal as he may justly elect. This conclusion is recognized by Admiralty Rule 54, providing that owners claiming a limitation of liability may file a libel or petition setting forth the facts and circumstances on which such limitation is claimed."

And on page 121, it is further said:

> "Therefore, we hold that the owners of this vessel are entitled to a decree limiting their liability, *so that the District Court had jurisdiction to adjudicate the merits of appellant's claim.*" (Italics ours.)

In *Weisshaar vs. Kimball S. S. Co.*, 128 Fed. 397 (C. C. A. 9th), *Certiarari denied*, 194 U. S. 638, 48 L. Ed. 1162, the Court said at page 401:

> "The limitation of liability provided for by the statute under which the present proceedings were had, is, according to its express terms, to be allowed only when the loss, damage, or injury occurs 'without the privity or knowledge' of the owner."

And finding that the facts and matters upon which the common-law claimant predicated liability were not "without the privity or knowledge" of the owner, the Court reversed the judg-

ment of the District Court dismissing the claim, and remanded the cause,

> "with directions to the Court below to dismiss the petition at petitioner's cost, leaving the administratrix of the estate of the deceased, Weisshaar, at liberty to pursue her action for damages in the State Court."

In *Parsons vs. Empire Transp. Co.*, 111 Fed. 202, *Certiorari denied*, 183 U. S. 699, 46 L. Ed. 396, the same Court, in reversing a judgment of the District Court with directions to deny a petition for limitation of liability, said:

> "It was not the intention of Congress, by the provisions of Sections 4283-4285 of the Revised Statutes, embodying provisions of the Act of March 3, 1851, nor of any act amendatory thereof, to relieve ship-owners of responsibility for their own willful or negligent acts. (Citing numerous cases.)"

In the *Erie Lighter 108*, 250 Fed. 490, the Court said, at page 493:

> "It is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this Court may undoubtedly proceed to determine whether it is liable at all, and, if so, to fix and assess the damages that should be awarded the claimant. That is what the Supreme Court rules sought to accomplish. (Citing cases.) *On the other*

hand, if the petitioner may not avail itself of the limited liability statutes, it would seem, both on authority and reason that, at least without claimant's consent, this Court is without jurisdiction to proceed further, but must dismiss the proceeding leaving the claimant free to pursue his remedy in the Courts of New Jersey. It was expressly so held by the Circuit Court of Appeals of the First Circuit in Quinlan vs. Pew, 56 Fed. 111, 5 C. C. A. 438. Such also is the necessary conclusion to be drawn from the disposition which was made of such proceedings, when the owners were held not to be entitled to limit their liability, in Weisshaar vs. Kimball S. S. Co., 128 Fed. 398, 63 C. C. A. 139, 65 L. R. A. 84 (C. C. A. 9th Cir.); Parsons vs. Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302 (C. C. A. 9th Cir.); in Re Myers Excursion & Navigation Co. (D. C. S. D. N. Y.) 57 Fed. 240, affirmed subnom. The Republic, 61 Fed. 109, 9 C. C. A. 386 (C. C. A. 2d Cir.). * * * *The only ground for an owner to come into Admiralty is because of his asserted right to limit his liability. If it is found that he is not entitled to that right, for the Court to go further and determine general liability, etc., would be to deprive a claimant of the choice of forums given to him by the statute and deprive him of his right to trial by jury.*" (Italics ours.)

The foregoing authorities conclusively establish the right of a claimant to have the merits of his claim determined by a jury in a common-law

Court, at his election, unless the ship-owner pleads and proves in a Court of Admiralty that the matters upon which the claimant relies to establish his claim were without his "privity or knowledge."

In the case at bar, the District Court refused to consider and determine the right of the petitioner to a limitation of his liability which was challenged by the respondent, but held that he would first determine whether there was any liability at all, and finding none dismissed the claim. (R. 139, 145.) The District Court also found and held that the claimant assumed the risk and was guilty of contributory negligence. (R. 141, 144, 147.) These issues, we submit, the claimant was entitled to have determined by a jury who may well disagree with the findings of the learned District Judge. To hold that the District Court may first examine the merits of the claim to determine whether any liability exists at all before determining the jurisdictional question of the owner's right to limit his liability, would necessarily operate to deprive a seaman of a common law remery and a jury trial in every case. The rights

given to him by the Judiciary Act of 1789 and the Merchant Marine Act of 1920 would become a mere mockery.

The petitioner's own testimony showed, without controversy, that the work which the claimant was engaged in at the time of his injury, was being done under the personal direction of the sole owner of the ship, that he was present at the moment of the accident and saw it, and knew the cause of and manner in which it occurred. Under these circumstances it cannot be said that the injury was without the "privity or knowledge" of the owner, and it follows that he was not entitled to a limitation of his liability, and the Court was therefore without jurisdiction to entertain the proceeding, over respondent's objection.

Authorities Relied Upon by the Petitioner

In his brief the petitioner cites numerous cases, (without discussion) which he claims support his contention, but none of them are even remotely in point, and for this reason we also pass them by without further comment.

Two recent decisions of this Court are chiefly relied upon by the petitioner who claims they are in conflict with the opinion of the Circuit Court of Appeals in the case at bar:

> *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, 273 U. S. 207; 71 L. Ed. 612;
>
> *The Edward, In Re East River Towing Co., Inc.*, 266 U. S. 355; 69 L. Ed. 324.

The petitioner quotes from *Hartford Accident & Indemnity Co. vs. Southern Pacific Co.*, certain language which, when considered apart from the facts involved therein, lends support to his contention. The case is, however, plainly distinguishable on the facts and the distinction is clearly pointed out by the court below in the following language:

> "The opinion of the Supreme Court of the United States delivered by Chief Justice Taft in Hartford Accident Co. vs. Sou. Pac., 273 U. S. 207, apparently was relied upon by the lower court in the procedure and disposition made of this case. That case follows Providence S. S. Co. vs. Hill, 109 U. S. 578, supra, with relation to the order of proof, as follows:
>
> "'* * * it shall be determined, first, whether the owner and his vessel are liable

at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants.'

"The question under consideration by the Supreme Court in Hartford Accident Co. vs. Sou. Pacific, supra, was whether after the determination by the trial court that the injury arose with the knowledge and privity of the owner, and that consequently it was not a proper case for the limitation of the ship owner's liability to the value of the ship, it was the duty of the Court to grant the petitioner's motion to dismiss the petition for lack of jurisdiction to proceed further notwithstanding the opposition of the claimants to such dismissal, and their desire to have the merits of their claims adjudicated in the admiralty court; or whether the Court, notwithstanding its finding that the accident was with the privity and knowledge of the owner, and notwithstanding the motion of the petitioner to dismiss his petition, should proceed to determine the merits of the controversy. It was held that the court under such circumstances should retain jurisdiction of the case and adjudicate the validity of the claims. *The difference between that case and the case at bar is that the Supreme Court was there considering a case in which the claimants invoked the jurisdiction of the Court to adjudicate their claims in the admiralty court after they had been brought*

> *into that court at the instance of the ship owners, while in the case at bar the claimant is objecting to the jurisdiction of the admiralty court and insisting upon his right to proceed at law.* Inasmuch as the right to determine whether or not the claimant's rights should be adjudicated in admiralty or at common law lies with the claimant (Plamals vs. S. S. 'Pinar Del Rio,' etc., 277 U. S. 151), and not with the Court, the decision in Hartford Accident Co. vs. Sou. Pacific is not at variance with the view that we take concerning the rights of the appellant." (R. 184, 185.) (Italics ours.)

In the *Edward, In Re East River Towing Co., Inc.*, 266 U. S. 355; 69 L. Ed. 324, *supra*, an explosion aboard a tug belonging to the East River Towing Co. caused the death of her Captain, Thomas McCafferty, and other members of her crew. The administratrix of McCafferty brought suit against the company in the Supreme Court of New York, and thereupon the company filed a petition for limitation of liability in the District Court of the United States. The second circuit certified two questions to this Court:

> "(1) If an action at law be brought such as is described in Merchant Marine Act 1920, Section 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?"

> "(2) Has the Merchant Marine Act 1920, Section 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?"

This Court answered question (1) in the affirmaitve and question (2) in the negative, and nothing more was decided. The question of "privity or knowledge" of the owner was not involved, nor was it mentioned by the Court. It is therefore difficult to follow counsel's argument on page 29 of the petitioner's brief to the effect that the decision of the Circuit Court "is squarely in conflict with the decision of this Court," in the cited case.

This Court has repeatedly said that the language used in an opinion is to be taken in connection with the facts of the case under consideration. Mr. Chief Justice Marshall first pronounced the rule in *Cohens vs. Virginia*, 6 Wheaton 264, as follows:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but

> ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Bramwell vs. United States Fidelity & Guaranty Co.*, 269 U. S. 483, 489, the Court said:

> "It is a rule of universal application that general expressions used in a Court's opinion are to be taken in connection with the case under consideration."

To the same effect see: *Pacific S. S. Co. vs. Peterson*, 73 L. Ed. 220, 223, and cases there cited.

The Court on the other hand has twice passed on the identical question presented, contrary to the petitioner's contention by denying certiorari in the following cases, from which we have quoted in the foregoing argument:

Weisshaar vs. Kimball S. S. Co., 128 Fed. 397, *certiorari denied*, 194 U. S. 638, 48 L. Ed. 1162, *supra;*

Parsons vs. Empire Transp. Co., 111 Fed. Fed. 202, *certiorari denied*, 183 U. S. 699, 46 L. Ed. 396, *supra.*

II.

When a seaman sues for personal injuries in the State Court and there is only one possible claimant and one owner, the advantage of the Limited Liability Act must be obtained by proper pleading in that Court and not by filing a petition in the United States District Court.

The petitioner recites in his petition filed in the District Court that he is the sole owner of the diesel Halibut Vessel "Aloha," (R. 2), and it is inconceivable that any other claim or claims than that of Winfield A. Green (the respondent) can possibly arise out of the accident in question. Moreover, the United States Commissioner with whom the monition directed that all claims be filed reported to the District Court that the only claim filed was that of respondent (R. 19), and thereupon an order of default was entered against all other claimants. (R. 33.) For these reasons the respondent moved to dissolve the restraining order and to dismiss the petition, thereby permitting him to prosecute his common law action in the State Court. (R. 19.) The District Court denied the motion (R. 35) and the Circuit Court affirmed this order in the opinion which is here for review. (R. 176.)

It is well settled that a defendant ship owner may set up the statutory limitation of liability as a defense, or a partial defense, to an action in the State Court; and when a suitor commences his action in the State Court, *and there is only one possible claimant and one owner*, the ship owner, if he desires to take advantage of the limited liability act, must do so by pleading the same in his answer and not by instituting an independent proceeding in a Court of Admiralty.

The Scotland, 105 U. S. 24, 24 L. Ed. 101;

Great Western, 118 U. S. 521, 30 L. Ed. 156;

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 L. Ed. 927;

The Lotta, 150 Fed. 219;

Delaware River Ferry Company vs. Amos, 179 Fed. 756;

Loughlin vs. McCaulley, 40 Atlantic 1020;

The Eureka, 108 Fed. 672;

The Rosa, 53 Fed. 132.

In the *Scotland*, *supra*, the Court decided that

> "It was not necessary that the ship owner should surrender and transfer the ship in

> order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and, if found in or confessing fault, may abide a decree against them for the value of the ship and freight, as found by the proofs."

In the *Great Western*, *supra*, it is said in the syllabus:

> "Limited liability may be claimed first merely by way of defense to an action; or, second, by surrendering the ship or paying her value in the Court. The latter method is only necessary when the ship owner desires to bring all the creditors claiming damages, into concourse and distribution."

In the *Sandanger* case, *supra*, the Court held (p. 260):

> "In a State Court, when there is only one possible claimant and one owner, the advantage of this section (Sec. 4283 of the Revised Statutes) may be obtained by proper pleading. The Lotta, 150 Fed. 219-222; Delaware River Ferry Co. vs. Amos, 179 Fed. 756."

In the *Lotta*, 150 Fed. 219, which is cited by this Court in support of the rule for which we contend, the Court refused to entertain a petition to limit liability, where there was only one possible claimant and one owner, and said:

> "All that petitioner can fairly claim is that he should not be subjected to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the State Court, and if there is an ulterior purpose, the petitioner's object in invoking the jurisdiction of this Court, is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this Court its Admiralty and Maritime jurisdiction saves to suitors in all cases the right of a common-law remedy where the common-law is competent to give it, and good faith requires that this proviso shall have its full and fair effect."

Although the right to a common-law remedy, with its attending jury trial, was reserved to *all* suitors by the judiciary act of 1789 (Sec. 563 Revised Statutes),

> "In ALL cases where the common-law is competent to give it,"

Congress in 1920 expressly declared in the Merchant Marine Act (Sec. 33) that:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action, for damages, at law with the right of trial by jury."

In view of this special declaration of Congress with respect to seamen, the claimant should not be deprived of his right to a common-law remedy and a jury trial, unless it clearly appears that it will be impossible for the petitioner to obtain the advantages of the limited liability statutes in the State Court. In the case at bar, when the claimant moved to dissolve the restraining order and dismiss the petition, it clearly appeared from the record that the petitioner is the sole owner of the vessel in question and that there is only one possible claim against it . No concourse or apportionment is required under these circumstances, and therefore the common-law Court is competent to give a full and complete remedy to both parties.

> "The statute is intended to limit the liability of the ship-owner, but not arbitrarily to give him a particular forum. * * * All that could be accomplished by appellant (petitioner), if successful on this petition, would be to avoid jury trials. It would be permitting it to try the case in another forum of its choice and this is unauthorized by the act."
>
> *The Aquitania*, 20 F. (2d) 457 (C. C. A. 2d).

It clearly appears that every protection and benefit which the petitioner may obtain in the Federal District Court is open to him in the State Court. His only reason for selecting the Federal forum is to avoid a jury trial, which plainly was not the purpose or intention of the Limited Liability Act.

In the recent case of *Hartford A. C. C. I. & Indemnity Company vs. Southern Pacific Company*, 71 Law. Ed. 464, Chief Justice Taft, referring to the objects and purposes of a proceeding such as the petitioner has here instituted, said:

> "The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to a proceeding *in rem*, as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."

Plainly, in the present case, there is no occasion for such a proceeding. Only one suit can possibly arise from the accident or "disaster" complained of. There is no "many cornered controversy" in-

volved requiring the administration of a court of equity. There is but a single claim and a single owner, under which circumstance, as pointed out by Judge Brown in *The Rosa*, 53 Fed. 132, and *The Eureka*, 108 Fed. 672, *supra*, a common-law court is competent to give a full and complete remedy:

> "The limitation of responsibility provided by law can be as fully and as readily secured in a common-law suit, as in this court, where there is but a single claim against the vessel, or her owners. All that is needed in either court, is an answer setting up the limitation of liability under section 4283 of the United States Revised Statutes, with a statement of the value of the owners' interest in the vessel and her freight pending. The question of value will then become one of the issues in the cause; but the determinaiton of such value is as appropriate and easy in the common-law suit as is the determination of ordinary questions of value in the usual course of common-law proceedings. To justify interference with the suitor's common-law remedy, therefore, the petition must show some needed relief against more than a single claim."

The Rosa, 53 Fed. 132, 133-135.

We are not unmindful of the decision of the Court in *White vs. Island Transportation Com-*

pany, 223 U. S. 58, holding that Courts of Admiralty have JURISDICTION to limit liability, even though there is but a single claim and a single owner. We do not question the *jurisdiction* of the District Court in such cases, nor the right of the ship-owner to take advantage of the limited liability act. Our only contention is that when a seaman elects to bring his action in the State Court, pursuant to Section 33 of the Merchant Marine Act of 1920, *and there is only one possible claimant and one owner*, the owner must move to limit his liability in that Court and cannot choose the Admiralty forum and thereby arbitrarily deprive the seaman of his right to a jury trial, which right is given to him by two different Acts of the Congress.

Carlisle Packing Co. vs. Sandanger, supra, is the only decision of the Court which touches the precise question at bar, and the holding therein in no manner militates against the decision in the *White* case. If, however, the holding of the Court in the *Sandanger* case can be construed to be in conflict with that in the *White* case, then, we believe, the *White* case must be deemed overruled,

for the reason that the *White* case was cited to the Court in the *Sandanger* case but was not mentioned in the opinion.

It is true, as stated by Judge Neterer in the *Salmon King*, 24 Fed. (2d) 555, that subsequently to the *White* decision, several of the inferior Federal Courts construed the language thereof to mean that, "whether there is a plurality of claims or only one," a ship-owner, to obtain the advantage of the limited liability act, must institute a special proceeding in a Court of Admiralty. The later decision of the Court in the *Sandanger* case, however, makes it plain that its holding in the *White* case was misinterpreted by those Courts.

It is respectfully submitted that the cases which we have cited (particularly the *Lotta* and *Delaware River Ferry Company vs. Amos*, *supra*, the reasoning of which was approved by this Court in the *Sandanger* case), conclusively demonstrate that there is no occasion for the proceeding which the petitioner instituted in the District Court; and that every advantage, privilege and benefit to which the petitioner is entitled under the Lim-

ited Liability Act can be obtained by proper pleading in the State Court, without depriving the respondent of his right to a jury trial.

CONCLUSION

In conclusion we respectfully submit:

(1) That the respondent's injury occurred with the "privity and knowledge" of the petitioner, and therefore the decree of the Circuit Court dismissing the proceedings for lack of jurisdiction should be affirmed.

(2) That in any event the petition to limit liability should be dismissed and the respondent be permitted to prosecute his action in the State Court for the reason that there is involved but one owner and only one possible claimant.

Respectfully submitted,

WINTER S. MARTIN,

SAMUEL B. BASSETT,

Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1930.

Axel Langnes, Owner of the Diesel Halibut Vessel "Aloha," Her Engines, etc., Petitioner,
vs.
Winfield A. Green, Claimant.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 24, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner, as sole owner of the fishing vessel "Aloha", on February 24, 1928, brought a proceeding in the federal district court for the western district of Washington, praying a limitation of liability under R. S., §§ 4283, 4284, 4285 (U. S. C., Title 46, §§ 183, 184, 185), which are copied in the margin.* It was stipulated by

*Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

the parties that the vessel was of no greater value than the sum of $5,000. After setting forth that petitioner was the sole owner of the vessel and that the vessel was seaworthy in all respects, the petition alleged, among other things, that the respondent on October 11, 1927, had commenced an action in a superior court of the State of Washington against petitioner to recover damages in the sum of $25,000 for personal injuries suffered while employed upon said vessel. The petition for a limitation of liability was filed four months later while that action was pending, and, it is said and not denied, within two days before the date set for the trial in the state court. Following the filing of the petition the federal district court issued an order restraining further proceedings in the state court, and a monition to all claimants to present their claims within a time fixed. The respondent, in response to the monition, filed his claim in the amount of $25,000 for damages resulting from the personal injuries referred to above. No other claim was filed.

Thereupon, respondent moved to dissolve the restraining order upon the ground that the state court had jurisdiction of the cause; that there was only one possible claimant and one owner; and that petitioner, therefore, might claim and obtain the advantage and benefit of the limitation of liability statute by proper pleading in the action pending in the state court. This motion the district court denied, and the cause in respect of respondent's claim was tried. Upon the hearing the district court determined that it should first inquire whether there was any liability, and if there was, then, whether it should be limited; and, at the conclusion of respondent's evidence without taking evidence on the part of petitioner, the court held that there was no liability and entered a decree accordingly. 32 F (2d) 284. Respondent appealed to the circuit court of appeals; and that court reversed the decree and remanded the case to the district court with directions to dismiss it for want of jurisdiction. 35 F. (2d) 447.

In the court of appeals the decree was assailed upon the grounds (1) that, there being but one possible claim and one owner, the ship owner should have sought his remedy for a limitation of liability by proper pleading in the state court; and (2) that the record disclosed the privity and knowledge of the owner in respect of the matters and things by which the injury to respondent resulted. The court rejected the first contention upon the authority of

White v. *Island Transportation Co.*, 233 U. S. 346; but sustained the second, holding that the pleadings and evidence disclosed that the injury complained of was occasioned with the privity and knowledge of the ship owner, and consequently the district court was without jurisdiction.

We are of opinion that the second contention, upon which the decree below was predicated, did not present a jurisdictional question. The district court had jurisdiction to pass upon the sufficiency of the pleadings and to decide the question upon the evidence; and a determination thereof either way, whether right or wrong, would have been a determination by that court upon the merits in the proper exercise of its jurisdiction. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, and cases cited; *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 608. In the *Binderup* case the rule was stated as follows (p. 305):

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit [Citing cases.] In that event the claim of federal right under the statute is a mere pretence and, in effect, is no claim at all."

But we deem it unnecessary to consider the second contention further, since the conclusion to which we have come rests upon the first contention, in respect of which, for reasons presently to be stated, we are of opinion both courts below were in error.

The preliminary objection is urged by petitioner, that, since the decision below upon this point was against respondent and he has not applied for certiorari, the point is not open here for consideration; but the objection is without merit, as a brief review of the decisions of this court will disclose.

In *Irvine* v. *The Hesper*, 122 U. S. 256, 266, the rule was announced without qualification that an appeal in admiralty from

the district court to the circuit court vacated the decree of the former and opened the case for a trial *de novo* in the latter court. At page 267 the court said:

"We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

In *Reid* v. *Am. Exp. Co.*, 241 U. S. 544, 548, in an opinion by Mr. Chief Justice White, this conclusion was reaffirmed; and attention was called to the fact that a full and convincing review of the authorities on the subject was contained in the opinion of the court of appeals for the second circuit in *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960. In the more recent case of *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 155, the rule was again stated in these words:

"On appeal in admiralty, there is a trial *de novo*. The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed."

The question then arises: What is the scope of inquiry in this court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but "must enter the judgment, which should have been rendered by the court below on the record then before it." *Baker* v. *Warner*, 231 U. S. 588, 593. And in *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588, following *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, it was held that on certiorari, likewise, the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the circuit [now district] court. In *Watts, Watts & Co.* v. *Unione Austriaca &c.*, 248 U. S. 9, 21, it was said that, "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require"; and "the rule

is the more insistent, because, in admiralty, cases are tried *de novo* on appeal." See also *Dorchy* v. *Kansas*, 264 U. S. 286, 289.

The authorities relied upon by petitioner are not to the contrary. They contain no challenge to the rule laid down in the decisions cited immediately above, but proceed upon the theory that the court is not *bound* to consider objections to the decree urged by respondent, in the absence of cross petition for certiorari. In *Warner Co.* v. *Pier Co.*, 278 U. S. 85, 91, where the authorities are collected, it is said:

"Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner."

In *Hubbard* v. *Tod*, 171 U. S. 474, 494, the court disposed of the matter by saying:

"And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

In *Fed. Trade Com.* v. *Pac. Paper Assn.*, 273 U. S. 52, respondents, without presenting a cross petition for certiorari, sought a reversal of a distinct portion of the decree. This court, in declining to consider the matter, said (p. 66):

"A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the decree reviewed. [Citing cases.] And, assuming power, we are not moved by any persuasive consideration to examine the parts of the commission's order to which respondents object."

These decisions simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so. In the present case, however, it is not necessary to consider this rule of practice because the respondent offers no objection to the decree of the court of appeals. In that court he attacked the decree of the district court upon the two grounds above stated, and the circuit court of appeals sustained the attack but upon one of such grounds only. Respondent here defends that decree upon

the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, quite apart from the fact that this is a proceeding in admiralty, and is here from an intermediate appellate court. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, where at page 435 it is said:

"It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed."

And, obviously, the right or duty of this court to consider these additional grounds will neither be affected by their rejection in the court below, nor be made to depend upon the effect finally given to them here.

We proceed, then, to inquire what disposition the court of appeals should have made of the case in respect of the point under consideration upon the record which was before that court. Section 24 (3) of the Judicial Code (U. S. C., Title 28, § 41 (3)) confers upon the district courts of the United States admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The provisions of the statute in respect of limitation of liability confer upon the owner of a vessel in a variety of cases, including the present case, when loss is occasioned without the privity or knowledge of the owner, the right to limit his liability to the value of his interest in the vessel and her freight then pending. That the action brought in the state court was authorized by the first of the statutes referred to is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there

was a plurality of claims or only one, is equally clear. *White* v. *Island Transportation Co., supra*, p. 351. The situation, then, is that one statute gave respondent the right to a common law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal district court. Needless to say that if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

Here the petition alleged that petitioner feared other claims, but no other claims were filed in response to the monition; the time therefor had expired and default had been noted; and nothing appears to suggest the possibility of any other claim. On the contrary, not only does a presumption fairly arise from the nature of the accident and all the surrounding circumstances that no other claim exists, but they are such as to reflect doubt upon the good faith of the allegation that petitioner was in fear of other claims; and the fact that petitioner delayed his proceeding for four months after the commencement of the state action and until two days before the date set for the trial is confirmatory of that view. In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, "In a state court, when there is only one possible claimant and one owner, the advantage of this section [§ 4283] may be obtained by proper pleading. *The Lotta*, 150 Fed. 219, 222; *Delaware River Ferry Co.* v. *Amos*, 179 Fed. 756." *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 260. See also *Steamboat Company* v. *Chase*, 16 Wall. 522, 532-533.

Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. Compare *Loughin* v. *McCaulley*, 186 Pa. 517. Notwithstanding this, however, the ship owner was free to invoke the jurisdiction of the federal district court (*White* v. *Island Transportation Co., supra*); and, that having been done, the ques-

tion which arose was not one of jurisdiction, but, as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause.

The term "discretion" denotes the absence of a hard and fast rule. *The Styria, Scopinich, Claimant*, v. *Morgan*, 186 U. S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

In the case now under review the problem presented to the district court by the motion of respondent was quite simple. Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner. The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the district court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court.

In *The Lotta*, 150 Fed. 219, cited as authority for the rule laid down in the *Sandanger* case, Judge Brawley, a capable admiralty judge, dealt with the same question in the manner here suggested and delivered an opinion which seems to us entirely sound. In

that case an action had been brought in a state court against the owner of the Lotta by an administrator to recover damages for the death of his son. The right to maintain such an action was conferred by state statute. Pending the prosecution of that action the owner of the Lotta filed a petition in the federal district court for a limitation of liability, and by an *ex parte* proceeding had the Lotta appraised, paid the appraised value into the registry of the court, and obtained an injunction restraining the prosecution of the action in the state court. After referring to the provision of law saving to suitors the right of a common law remedy, Judge Brawley said that the plaintiff had the right to pursue his remedy in the state court unless the act providing for a limitation of liability clearly deprived him of it; that where there was only a single claim there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court; and that an answer setting up the limitation of liability would give the ship owner the relief to which he was entitled. It appearing there, as it appears here, that only one claim had been presented, and that the time fixed by the monition had expired, the court said (p. 222-223):

"The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that court as in this. In the ex parte proceedings here the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, the plaintiff is entitled to be heard on that question, and in the usual course of the common-law proceeding that issue can be fairly tried.

. . . . . .

"All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the state court, and if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect."

Thereupon an order was entered dissolving the injunction against the prosecution of the action in the state court, but retaining the

petition for a limitation of liability, for the reason, as the court said, that "if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question. . . . and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability." See also *Delaware River Ferry Co.* v. *Amos*, 179 Fed. 756.

Disposition of the matter, so as to allow the action to proceed in the state court, finds warrant in like principles which have been applied in other kinds of cases. Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless "the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum." *The Maggie Hammond*, 9 Wall. 435, 457; *The Belgenland*, 114 U. S. 355, 368; *Charter Shipping Co.* v. *Bowring, &c.*, 281 U. S. 515, 517. See also, generally, *Watts, Watts & Co.* v. *Unione Austriaca &c., supra;* and compare the opinion of the district court upon the point in the same case, 224 Fed. 188, 191. So, while the courts of this country have and may entertain jurisdiction of actions between nonresident foreigners for torts committed in a foreign country, they will exercise such jurisdiction in their discretion and only in special cases. *Dewitt* v. *Buchanan*, 54 Barb. 31, 34. And see also *National Telephone Manuf. Co.* v. *Du Bois*, 165 Mass. 117, 118; *Harris et al.* v. *Pullman, et al.*, 84 Ill. 20, 27.

The decrees of both courts below must be reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.